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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

JOSEPH A. RICCHETTI, individually and dba KINGS COUNTY DISTRIBUTING CO.; BAY BEVERAGE, INC., a corporation; LOUIS C. ROSSI, individually and dba ROSSI DISTRIBUTING CO.; on behalf of themselves and all other Burgermeister beer distributors similarly situated,

Petitioners,

vs.

MEISTER BRAU, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on September 11, 1970.

CITATIONS TO OPINIONS BELOW

The "Order" of the District Court denying petitioners' motion for a preliminary injunction is unreported and is printed in *Appendix* A herein.[1] The "Advice to Counsel" of the United States Court of Appeals for the Ninth Circuit pertaining to its suggestion that the order denying the preliminary injunction be considered a decree denying a permanent injunction is unreported and is printed in *Appendix* B herein. The "Judgment of Dismissal" of the District Court dismissing petitioners' complaint with prejudice is unreported and is printed in *Appendix* C herein. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of dismissal of the District Court is reported in 431 F.2d 1211 (9th Cir. 1970) and is printed in *Appendix* D herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit in this cause was entered on September 11, 1970. The jurisdiction of this Court is invoked under 62 Stat. 928 (1948), 28 U.S.C. §1254(1).

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[1] The District Court wrote no opinion and made no findings of fact pursuant to its denial of petitioner's motion for a preliminary injunction.

QUESTIONS PRESENTED

1. Was the acquisition of the Burgermeister brewing assets by Meister Brau, Inc. and the use of those assets by Meister Brau, Inc. to terminate eight independent wholesale beer distributors located in California and Nevada as distributors of the Burgermeister brand of beer a violation of Section 7 of the Clayton Act, 38 Stat. 737 (1914), *as amended*, 15 U.S.C. §18, when, one year prior to this acquisition, Meister Brau, Inc. commenced, and thereafter expanded, the distribution of its Meister Brau Lite brand of beer in California through independent wholesale distributors in direct competition with the Burgermeister brand of beer and other brands of beer sold in California?

2. Does Section 16 of the Clayton Act, 38 Stat. 737 (1914), *as amended*, 15 U.S.C. §26, authorize petitioners, independent wholesale beer distributors, to obtain injunctive relief as a result of their termination as distributors of the Burgermeister brand of beer when that termination was a direct and proximate result of the violation by Meister Brau, Inc. of Section 7 of the Clayton Act, 38 Stat. 737 (1914), *as amended*, 15 U.S.C. §18?

3. Was the judicially approved sale of the Burgermeister brewing assets by the Jos. Schlitz Brewing Co. to Meister Brau, Inc. a violation of the standards established by this Court governing divestitures when, prior to the District Court's approval of said sale, Meister Brau, Inc. and the Jos. Schlitz Brewing Co.

agreed in writing that they would not release or allow to be released any publicity pertaining to said sale prior to its approval by the District Court—thereby preventing petitioners and other eligible persons from intervening at the hearing on said sale?

4. Are petitioners, independent wholesale beer distributors, entitled to equitable relief as a result of their termination as distributors of the Burgermeister brand of beer when that termination violated the representations made by the president of Meister Brau, Inc. to the District Court that the then existing independent wholesale distributors of the Burgermeister brand of beer were satisfactory to Meister Brau, Inc. in order for it to commence the manufacture and sale of Burgermeister beer and that Meister Brau, Inc. intended to establish, solidify and maintain its relationship with the existing independent distributors of Burgermeister beer—which Meister Brau, Inc. recognized represented a fairly significant volume for most of the distributors who handled it?

5. Did Meister Brau, Inc. violate Section 1 of the Sherman Act, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §1, when it combined and conspired with various other independent wholesale beer distributors to appoint them as exclusive distributors of the Burgermeister and Meister Brau Lite brands of beer and, pursuant thereto, to terminate petitioners as distributors of the Burgermeister brand of beer without petitioners having the opportunity to sell and transfer to an acceptable purchaser the goodwill that they developed for the Burgermeister brand of beer and

without compensating petitioners for the goodwill that they developed for the Burgermeister brand of beer?

STATUTES INVOLVED

The statutes involved in this cause are Section 1 of the Sherman Act, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §1, Section 7 of the Clayton Act, 38 Stat. 737 (1914), *as amended*, 15 U.S.C. §18, and Section 16 of the Clayton Act, 38 Stat. 737 (1914), *as amended*, 15 U.S.C. §26, which are found in volume 3 of the official edition at pages 2604, 2610 and 2616, respectively. They are printed herein as *Appendix E*.

STATEMENT[1]

1. Basis for Federal Jurisdiction

This is a private antitrust action filed in the United States Distgict Court for the Northern District of California on November 14, 1969, by three named independent wholesale beer distributors, on behalf of themselves and all other Burgermeister beer distributors similarly situated,[2] seeking injunctive relief only

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[1]The record as certified in the Court of Appeals consists of five separate volumes plus exhibits. Volume 1 is the clerk's transcript and volumes 2, 3, 4 and 5 are the reporter's transcript. Reference in this petition to the clerk's and reporter's transcripts is made by citing the number of the volume, followed by an "R" and then citing the page number (i.e., 3 R 151). Reference in this petition to an exhibit is made by an "Ex" followed by the number of the exhibit.

[2]Defined in the complaint as those distributors of Burgermeister beer who were notified by Meister Brau that as of the date of its acquisition of the Burgermeister brewing assets they would no longer be authorized to distribute the Burgermeister brand of beer. (1 R 4)

as a result of the alleged violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act by respondent Meister Brau, Inc. (hereinafter referred to as "Meister Brau"). The basis for federal jurisdiction in the District Court was Section 16 of the Clayton Act.

2. The Nature of the Case

Petitioners alleged that the acquisition of the Burgermeister brewing assets by Meister Brau and the use of those assets to cause their termination as distributors of the Burgermeister brand of beer may be substantially to lessen competition, or to tend to create a monopoly, in the *wholesale* distribution and sale of beer in the State of California and in each of the geographical areas served by petitioners in violation of Section 7 of the Clayton Act. (1 R 1-11) Petitioners also alleged that Meister Brau violated Section 1 of the Sherman Act when it combined and conspired with various other independent wholesale beer distributors to appoint them as exclusive distributors of the Burgermeister and Meister Brau Lite brands of beer and, pursuant thereto, to terminate petitioners as distributors of the Burgermeister brand of beer without petitioners having the opportunity to sell and transfer to an acceptable purchaser the goodwill that they developed for the Burgermeister brand of beer. (1 R 1-11)

Petitioners sought injunctive relief only in the form of (a) a temporary restraining order and a preliminary injunction enjoining Meister Brau from taking any further action to consummate their termination

as distributors of the Burgermeister brand of beer pending the adjudication of the merits of the action, and (b) a permanent injunction enjoining petitioners' termination as distributors of the Burgermeister brand of beer except for good cause, with at least 90 days' advance notice, and with the opportunity for petitioners to sell and transfer their Burgermeister assets to an acceptable purchaser. (1 R 11) The injunctive relief sought by petitioners would in no wise restrain Meister Brau from appointing other distributors to distribute Burgermeister beer in petitioners' territory.

Petitioners limited their prayer to injunctive relief because of their great desire to remain active in the wholesale distribution of beer and to maintain the businesses which they had built over many years of hard work. Money damages could not provide this because of the oligopolistic nature of the beer industry.

3. The Proceedings to Date

On November 14, 1969, the District Court (Harris, J.) issued a temporary restraining order enjoining Meister Brau from taking any further action to consummate the termination of petitioners as Burgermeister distributors. (1 R 31-32) On November 18, 19, 21, 24 and 25, 1969, a full hearing was held before the District Court on petitioners' motion for a preliminary injunction.[4]

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[4]At this hearing petitioners presented the testimony of the principals of five of the eight distributors who were notified of their termination as distributors of the Burgermeister brand of beer, the testimony of the sales manager of the Pacific Division of the Jos.

On November 26, 1969, the District Court made and entered its written order denying petitioners' motion for a preliminary injunction and vacating the temporary restraining order it had previously made and entered on November 14, 1969. (*Appendix* A) The District Court made no findings of fact and merely held that there was no equitable considerations which would prompt the Court to grant injunctive relief, that there was no reasonable probability from the testimony and evidence presented that petitioners would ultimately prevail on the merits, that there was no asserted *status quo* to preserve allegedly existing between petitioners and respondent, that there was no showing of irreparable injury which would occur during the pendency of the action and that the motion for a preliminary injunction was without merit.[5] (*Appendix* A)

On November 28, 1969, petitioners filed a notice of appeal (1 R 70-71) from the District Court's order and moved, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, for an injunction pending appeal. (1 R 60-64) This motion was denied by the District Court. (1 R 72-73)

Schlitz Brewing Co. and the testimony of the assistant executive secretary of the California Beer Wholesalers Association. In addition, petitioners were able to subpoena and call as adverse witnesses four of the officers of Meister Brau. Respondent called no witnesses and offered no exhibits in evidence other than the affidavits of two of the officers of Meister Brau. (Def. Exs. a and b, 5 R 196)

[5]The lack of any specific findings of fact by the District Court makes it impossible to determine the grounds of its action. Such findings are required under Fed. R. Civil Proc. 52; *United States v. El Paso Natural Gas Co.*, 376 U.S. 653, 656-57 (1964).

On December 3, 1969, petitioners filed with the United States Court of Appeals for the Ninth Circuit a motion, pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, for an injunction pending appeal. This motion was denied by the Court of Appeals.

On December 12, 1969, petitioners lodged with the Clerk of the United States Supreme Court an application to Mr. Justice Douglas for a stay of the District Court's order pending the hearing and determination of petitioners' appeal to the Court of Appeals or, in the alternative, for an injunction pending the hearing and determination of petitioners' appeal to the Court of Appeals. Mr. Justice Douglas denied this application on December 29, 1969.

On December 15, 1969, petitioners filed with the Court of Appeals a motion to expedite the briefing and hearing of the appeal. That motion was granted. On January 9, 1970, petitioners filed their opening brief; on January 29, 1970, respondent filed its brief; and on February 9, 1970, petitioners filed their reply brief.

On February 25, 1970, the Court of Appeals heard oral argument on the appeal, at which time it suggested that the District Court consider the issue of a permanent injunction on the record made at its prior hearings on petitioners motion for a preliminary injunction. Following oral argument, the Court of Appeals issued a written "Advice to Counsel". (*Appendix* B) The parties then filed a written stipulation in the District Court submitting the case to the

District Court for final determination on the entire record made at the hearings on petitioners' motion for a preliminary injunction. (1 R 82-84) Petitioners submitted to the District Court its proposed "Decree Granting Permanent Injunction" (1 R 89-90) and respondent submitted its proposed "Judgment of Dismissal". (*Appendix* C) On March 3, 1970, the District Court signed the "Judgment of Dismissal", from which petitioners appealed. (1 R 81) On September 11, 1970, the Court of Appeals affirmed the judgment of the District Court. (*Appendix* D).

4. The Material Facts

(a) The acquisition of Burgermeister by Schlitz

On December 29, 1961, the Jos. Schlitz Brewing Co. (hereinafter referred to as "Schlitz") purchased the assets of the Burgermeister Brewing Corporation, except cash, for $12,639,250. *United States v. Jos. Schlitz Brewing Co.*, 253 F.Supp. 129, 140 (N.D. Cal. 1966), *aff'd mem., Jos. Schlitz Brewing Co. v. United States*, 385 U.S. 37 (1966). At the time of this acquisition, Burgermeister had an exceptionally strong distributor organization. *Ibid.* (Finding No. 91)

When Schlitz acquired Burgermeister it was able to choose between the Schlitz and the Burgermeister wholesalers and was thus able to strengthen its wholesaler organization by choosing the more effective of the two wholesalers. *United States v. Jos. Schlitz Brewing Co., supra* at 141 (Finding No. 108). In the first six months following the acquisition of Burgermeister, Schlitz terminated its relationship with eight

Burgermeister distributors and 23 Schlitz distributors in the State of California. *Ibid.* (Finding No. 169)

On February 19, 1964, the United States filed suit in the United States District Court for the Northern District of California against the Jos. Schlitz Brewing Co. and General Brewing Company complaining that the purchase and acquisition of the assets of Burgermeister by Schlitz and of the stock acquisition in John Labatt, Ltd. (which controls General Brewing Corporation, brewers of Lucky Lager beer) may be to substantially lessen competition, or tend to create a monopoly, in the production and sale of beer in the United States, the West, and the State of California, in violation of Section 7 of the Clayton Act. *United States v. Jos. Schlitz Brewing Co., supra* at 131, 182.

On March 24, 1966, after a lengthy trial, the United States District Court for the Northern District of California (Weigel, J.) entered its Final Judgment and Decree holding that the acquisition by Schlitz of the business and assets of Burgermeister constituted a violation of Section 7 of the Clayton Act. *Ibid.* at 182. One of the keystones underlying this holding was the Court's findings that "Distributors (also referred to as wholesalers) are extremely important to successful competition of brewers in the brewing industry," *Ibid.* at 137 (Finding No. 59) and that:

> "The changes in its distributor organization that Schlitz effectuated after it acquired the assets of Burgermeister resulted in a substantial lessening

> of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California." *Ibid.* at 142 (Finding No. 119).

The effect of the Schlitz acquisition of Burgermeister on the independent wholesale beer distributors was also reflected in the Court's "Comments on the Findings of Fact Proposed by Defendant Jos. Schlitz Brewing Co.", wherein the Court stated at 149:

> "Although Schlitz does not 'own' the beer wholesalers who sold Burgermeister or who now sell Lucky Lager, it is clear that Schlitz could and did 'force' its full line of products into some outlets and take its products away from other outlets. In either case, the wholesalers involved become less effective distributors for the products of other brewers. Thus, the Schlitz acquisitions of both American Brewing Companies have had and would continue to have serious anti-competitive consequences at the important wholesaler level in the beer industry."

The Final Judgment and Decree in *United States v. Jos. Schlitz Brewing Co., supra* at 183, required Schlitz to "make bona fide, persistent and sustained efforts to divest itself of the Burgermeister assets by sale . . ." The Final Judgment and Decree further provided:

> "Schlitz is ordered and directed to continue to offer to sell Burgermeister beer to the distributors who at the time of entry of this Final Judgment and Decree distribute Burgermeister beer, and to use its best efforts to retain for the pur-

chaser of the Burgermeister assets those distributors presently selling Burgermeister beer.

"Schlitz shall not increase its sales, if any, of Old Milwaukee beer to distributors who sell Burgermeister beer nor its advertising or promotion of Old Milwaukee beer, if any, for sale in States where Burgermeister beer is sold until six months after Schlitz has sold the Burgermeister assets as hereinabove required." *Ibid.* at 184.

(b) Meister Brau, Inc.

In 1968, Meister Brau was the Nation's 24th largest brewer with an annual production capacity in excess of 1,300,000 barrels of beer. Total barrels sold by Meister Brau in 1968 was 889,245, representing sales of approximately $33 million. Its primary marketing area in 1968 was the midwest and in the Chicago area it ranked number one in take home consumption. In 1966, it acquired the Buckeye Brewery Company of Toledo, Ohio. (Plt. Ex. 12, 3 R 29, 5 R 189)

In November 1968, Meister Brau entered the California market through the introduction in Los Angeles of a revolutionary new beer known as Meister Brau Lite, which contained one-third fewer calories than its regular premium beers. From November 1968 to July 1969, Meister Brau expanded its distribution of Meister Brau Lite beer in California as part of a program to build Meister Brau Lite beer into a national premium beer. (Plt. Ex. 15, 3 R 61-62, 5 R 190, 194) Meister Brau commenced and expanded its distribution of Meister Brau Lite beer in Cali-

fornia through independent wholesale beer distributors. (Plt. Ex. 19, p. 17, 3 R 69, 5 R 194)[6]

(c) Meister Brau's acquisition of Burgermeister

In 1967, representatives of Meister Brau visited the Burgermeister brewery in San Francisco, looked at a great deal of data about it, researched the operation thoroughly, made an offer to Schlitz to buy it which was unaccepted, and subsequently kept in contact with it. (Plt. Ex. 19, p. 17)

In 1968, the Jos. Schlitz Brewing Co. sold 650,227 barrels of the Burgermeister brand of beer, of which 581,402 barrels were sold in California. (Plt. Ex. 18, 3 R 65, 5 R 190, 194) In that year, Burgermeister was the sixth largest selling brand in California and accounted for 5.5% of the California market. (Plt. Ex. 17, 3 R 64, 5 R 194; Plt. Ex. 36 not admitted in evidence, 5 R 195)

On July 7, 1969, Schlitz and Meister Brau entered into an agreement in the form of an option whereby Schlitz agreed to sell and Meister Brau agreed to buy the Burgermeister assets (except cash, accounts and notes receivable) for $5,500,000 plus the adjusted book value of inventory and an agreed upon value as to merchandising materials.[7] (Plt. Ex. 20, 3 R 81,

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[6]Plt. Ex. 19 was the transcript of the hearing on July 23, 1969, on the sale of the Burgermeister assets to Meister Brau. It was inadvertently not admitted in evidence at the hearing on petitioners' motion for a preliminary injunction.

[7]In addition to the purchase price of $12,039,350 which Schlitz paid for the Burgermeister assets in 1961, Schlitz "invested money in Burgermeister after the acquisition, making the cost of the acquisition to Schlitz as high as $23,563,000—approximately $11 million more than appears in the record." *Antitrust & Trade Regu-*

5 R 190) This option agreement made provision for Meister Brau to assume Schlitz' outstanding commitments with suppliers for packaging materials and various lease agreements entered into by Schlitz. (Plt. Ex. 20) It made no provision for or mention of Schlitz' commitments with its independent wholesale distributors who distributed the Burgermeister brand of beer.[8] It did provide that the sale of the Burgermeister assets to Meister Brau was subject to the approval of the District Court and that prior to such approval, neither Schlitz nor Meister Brau "will release, or allow to be released to any person through any communications media any publicity concerning this transaction." (Plt. Ex. 20, p. 11)

On July 23, 1969, a hearing was held before the District Court (Weigel, J.) on the proposed sale of the Burgermeister assets by Schlitz to Meister Brau. The transcript of that hearing reveals that only the attorneys for the Government, Jos. Schlitz Brewing Co. and General Brewing Co. initially appeared at the hearing. (Plt. Ex. 19, 3 R 69) The Court asked, "Is there any representative from the proposed pur-

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lation Report, August 5, 1969, p. A-6. Without taking into account depreciation and possible Schlitz brand assets, such as bottles and barrels marked with the Schlitz brand, the sale of the Burgermeister assets to Meister Brau for $5.5 million represents a loss to Schlitz of approximately $18 million. Sales of Burgermeister beer in 1968 amounted to 90% of the sales of Burgermeister beer in 1961—the year preceding Schlitz' acquisition of Burgermeister.

[8]Schlitz had two different types of written contracts with its independent wholesale distributors who distributed the Burgermeister brand of beer. One was called a Declaration of Terms (Plt. Ex. 22 not admitted into evidence, 4 R 37, 5 R 191) and the other was called a Wholesaler Franchise Agreement. (Plt. Ex. 11 not admitted into evidence, 3 R 27, 5 R 189) The three named petitioners were covered by the Declaration of Terms contract.

chaser?" Counsel for Schlitz replied there was not because "We saw no need for it."* The president of Meister Brau was, however, in San Francisco on July 23, 1969, and, at the request of the Court, he was called to testify at the hearing. (Plt. Ex. 19, pp. 12-13)

The Court asked the president of Meister Brau, "So far as you are concerned, is the distribution network that you will have for the distribution of Burgermeister, if this transaction goes through, satisfactory for you to commence operations?" Meister Brau's president replied, "Yes. We are familiar with the marketing conditions in California, and know that the Burgermeister volume represents a fairly significant volume for most of the distributors who are handling it, and therefore feel confident we can maintain and actually increase their enthusiasm." (Plt. Ex. 19, pp. 19-20)

The Court asked Meister Brau's president, "What hold, if any, in terms of blocking your entry into the market or any other way or respect would Joseph Schlitz have upon you after you consummated this agreement?" (Plt. Ex. 19, p. 29) He replied:

> "None. I think from a marketing approach, the longer that they—if they were to bring out [in] a very short period of time after the transfer was concluded—if they were to bring out their Old Milwaukee brand in this market with a heavy push through there, of necessity will be common distributors before we have a chance to

*The Chicago law firm of Kirkland, Ellis, Hodson, Chaffetz & Masters represented both Meister Brau and Schlitz. (3 R 63)

> *really establish and solidify* our relationships with those distributors. That might be detrimental to us, but that would be a marketing action, not a particular hold. But it would be based on economies of a long established relationship on their part with the distributors and a very recent relationship on our part." (Plt. Ex. 19, pp. 29-30) (emphasis added).

On July 23, 1969, the Court approved the sale of the Burgermeister assets to Meister Brau based upon the representations of the plaintiff United States and defendant General Brewing Corporation that the "purposes of the Final Judgment and Decree to protect the public interest in free and open competition and against any violation of Section 7 of the Clayton Act will be served by consummation of the proposed plan of sale." (Plt. Ex. 20)

By letter dated July 23, 1969, Meister Brau's Senior Vice President, Robert E. Ingram, informed the Burgermeister distributors (including all of the petitioners) that Meister Brau was scheduled to acquire the assets of Burgermeister on October 1, 1969, and that he was "delighted to know we will be working together soon on the distribution and sale of Burgermeister Beer."[10] (Plt. Ex. 3, 2 R 63, 90)

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[10]This brought the following response dated July 29, 1969, from Jim Straley, President of Petitioner Bay Beverage: "Congratulations to Meister Brau! It was with extreme pleasure that we received your letter confirming the acquisition by Meister Brau of the Burgermeister Brewery. With your enthusiastic support I am confident that we can once again move Burgie upward to be a sales leader in California. It is with keen anticipation that we await your next move forward. The moon can be reached through hard work, dedication and perfection. Let's put Burgie there." (Plt. Ex. 30, 5 R 87, 192, 194)

By letter dated August 21, 1969, Mr. Ingram again wrote to all of the Burgermeister distributors, including the petitioners, informing them of the appointment of Mr. Edward Kaleff as the Vice-President-Sales of Burgermeister effective August 25, 1969; that October 1, 1969, was still the target date for Meister Brau to assume ownership of Burgermeister; and that immediately after the first part of October "we intend to have distributor meetings in all areas to discuss your individual problems with each of you. You can expect to hear from us in this regard very shortly." (Plt. Ex. 4, 2 R 64, 90)

After Mr. Kaleff was hired by Meister Brau, Mr. Ingram assigned him the responsibility of evaluating the Burgermeister distributors, the Meister Brau Lite distributors and other distributors, all to the end of determining whom should distribute the Burgermeister brand of beer once Meister Brau assumed ownership of the Burgermeister assets. (1 R 37-39) (Def. Ex. b, 5 R 196)

By letter dated October 2, 1969, Meister Brau's president, James W. Howard, informed the Burgermeister distributors, including all of the petitioners, that Meister Brau's acquisition of Burgermeister would take place on October 31, 1969; that Messrs. Ingram and Kaleff would arrange "to meet you at an early date to plan the marketing programs"; and that it gave him "great pleasure to welcome you as a member of our Meister Brau Burgie team and I, too, look forward to meeting you in person in the near future." (Plt. Ex. 5, 2 R 65, 90)

On October 1, 1969, Mr. Kaleff employed Michael T. Walker and Harold L. Everett as Area Sales Managers for Northern and Southern California. They were then instructed by Mr. Kaleff to contact the then existing distributors of Burgermeister beer and obtain from each of them certain information and to inform them:

> "that similar information was being solicited from existing distributors of "Lite" brand beer manufactured by Meister Brau, and from every other party interested in the marketing area concerned, and that the selection of distributors for 'Burgermeister' beer by the new Burgermeister Brewing Corporation would be made only after evaluation of all information obtained." (1 R 38-39) (Def. Ex. b, 5 R 196)

Commencing on October 15, 1969, Messrs. Walker and Everett began contacting the Burgermeister distributors.[9] From that time until November 14, 1969, they, or their subordinates, contacted and evaluated 70 Burgermeister distributors and 25 to 30 distributors who did not handle the Burgermeister brand of beer. (4 R 89, 91) The information obtained by Messrs. Walker and Everett and their evaluation of it was set forth in reports prepared by them for Mr. Kaleff. Typical of these reports are those prepared

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[9]By this time the date for the acquisition of the Burgermeister assets had been postponed to November 17, 1969. The reasons for the delays were the complexities of obtaining a license, the transferring of production of Burgermeister beer from Schlitz' Van Nuys plant to the San Francisco brewery, the building of a marketing organization from scratch, transferring the accounting records from Milwaukee to Chicago, meeting with the key personnel at the Burgermeister plant, and the raising of the $5.5 million. (3 R 91-95)

on petitioner Bay Beverage, Inc., who lost the Burgermeister line, and Somerset Distributors, Inc., who obtained the Burgermeister line.[12] These two reports are set forth in *Appendix* F herein.

On November 4, 1969, a meeting was held in the office of Meister Brau's president in Chicago, Illinois, to decide who would become Burgermeister distributors when Meister Brau acquired the Burgermeister assets from Schlitz. (3 R 96-97) Present were Messrs. Howard, Ingram, Kaleff and two other Meister Brau employees. At this meeting, most of the distributors which were subsequently appointed, as well as those not selected, were discussed. (3 R 97)

Although the information for the evaluations had not been obtained from petitioner Ricchetti by the time of the Chicago meeting, he was nevertheless discussed at this meeting and it was there decided not to continue him as a Burgermeister distributor. (5 R 114) Instead, Meister Brau decided to appoint the Meister Brau Lite distributor in Visalia, California (Johnson Distributing Co.) as the Burgermeister and Meister Brau Lite distributor in the Tulare County portion of Ricchetti's territory and to appoint the Meister Brau Lite distributor in Fresno, California (D & D Beverage Co.) as the Burgermeister and Meister Brau Lite distributor in the Kings County portion of Ricchetti's territory. (3 R 97-104)

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[12]The information obtained for the evaluations of the 95 to 100 distributors during the thirty day period from October 15, 1969, to November 14, 1969 (23 working days), did not include any specific financial information about the distributors (5 R 18) and did not include any determination of the distributors' reputation in the trade. (3 R 38-39)

At this November 4th meeting in Chicago, it was decided not to continue petitioner Bay Beverage, Inc. as the Burgermeister distributor in the Long Beach and harbor area of Los Angeles County. It was also decided not to continue Banner Distributing Co. as the Burgermeister distributor in the adjoining Torrance area of Los Angeles County. (4 R 9-15) In addition, Quality Brands Distributing Co. was discontinued as the Meister Brau Lite distributor in the Long Beach area. (1 R 56) In their place, it was decided to appoint Somerset Distributors, Inc., owned by Frank Sinatra and Associates, to distribute the Burgermeister and Meister Brau Lite brands of beer in the Long Beach and Torrance areas of Los Angeles County.[18]

It was also decided at this Chicago meeting that petitioner Rossi Distributing Co. would not be continued as the Burgermeister and Meister Brau Lite distributor in the city of San Francisco, but, instead, it was decided to appoint San Francisco Distributors, Inc. as the Burgermeister and Meister Brau Lite distributor in San Francisco. (4 R 22-23; 1 R 53)

The decision on whether or not to continue certain small independent distributors as Burgermeister dis-

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[18]Prior to the acquisition of the Burgermeister assets by Meister Brau on November 17, 1960, Mr. Kaleff met personally with the officers of Somerset Distributors, Inc., on two separate occasions in regard to their becoming a Burgermeister distributor. (5 R 3-14) One of these occasions was aboard the airplane of Mr. Frank Sinatra, which flew Mr. Kaleff to the Nevada Beer Wholesalers' convention. (4 R 5) Except for the distributors located in San Francisco and Somerset Distributors, Inc., Mr. Kaleff did not meet personally with any of the other 95-100 independent wholesale distributors which were evaluated by Meister Brau. (5 R 10)

tributors was left to the judgment of Mr. Kaleff. (5 R 31-32) Between November 4, 1969, and November 17, 1969, Mr. Kaleff decided not to continue Madera Beverage Co., Marino Distributing Co., Solano Ice & Soda Works and Harrison Distributors as Burgermeister distributors. (5 R 31-32)

On November 5, 1969, Meister Brau notified petitioner Bay Beverage, Inc., that it would not be continued as a Burgermeister distributor as of November 17, 1969 (4 R 50); petitioner Ricchetti, Madera Beverage Co. and Marino Distributing Co. were so notified on November 12, 1969 (5 R 120, 123, 127); petitioner Rossi was so notified on November 13, 1969 (5 R 126); and Harrison Distributors was so notified on November 14, 1969. (5 R 128) Meister Brau's president testified that the lack of timely notice was based upon their feeling that it was more important to contact the distributors who were going to be appointed or continued as Burgermeister distributors than petitioners who were not, that Meister Brau did not assume any of Schlitz' contractual relations to the petitioners, and that technically Meister Brau had no duty to notify petitioners that they were not going to be continued as Burgermeister distributors. (4 R 26-28, 34)

(d) The Petitioners

Petitioner Ricchetti commenced doing business in October 1953 as a Burgermeister distributor in Kings and Tulare counties and a portion of Fresno county, California. (2 R 53, 57) At the time of Schlitz' acquisition of Burgermeister in December, 1961, Ricchetti

distributed Budweiser in addition to Burgermeister. At that time, Riechetti was told by Schlitz that it:

> "would give me ninety days to determine whether I thought it would be judicious on my part to accept the Schlitz brand into the house and to retain Burgermeister—or to give up—under the stipulation that I would give up Budweiser, or to give up the Schlitz and Burgermeister and continue with Budweiser." (2 R 61)

Riechetti gave up Budweiser in ninety days. (2 R 62)

At the time of the hearing on petitioners' motion for a preliminary injunction, between 35% and 40% of Riechetti's total dollar sales were of the Burgermeister brand. (1 R 27). The loss of these sales "will be to cause [Riechetti] to suffer very severe economic losses and to probably go out of business" affecting his ability to distribute his other lines of beer and wine."[14] (1 R 28) At the time of the hearing, Riechetti was one of two wholesale beer distributors in the small town of Hanford, California, employed seven persons, plus his wife and daughter (who were active in the business), and owned five trucks, a recently constructed warehouse and various other equipment required in the beverage distribution business. (2 R 55-56)

In 1962, Mr. James Straley, owner of petitioner Bay Beverage, Inc., sold everything he had, scraped together all the cash he could, borrowed some money and went into the wholesale beer distribution business.

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[14]Since the loss of the Burgermeister brand, petitioner Riechetti has borrowed very heavily and taken a great amount of his savings to keep his business going.

(4 R 58) From 1962 until November 1969, petitioner Bay Beverage, Inc. distributed the Burgermeister brand of beer in the Long Beach and harbor area of Los Angeles County. (4 R 41-42) During these years, Mr. Straley was primarily interested in increasing his sales and building a strong sales organization, which resulted in a small margin of profit in some years and a loss in other years. (4 R 58) However, the result was that at the time of the hearing, Mr. Straley owned all the equipment necessary to run a beer business and had built an organization of 19 employees. The effect of the loss of the Burgermeister line, representing 25% of his total sales, was expressed by Mr. Straley as follows:

> "I haven't completely assessed what I must do. If we take it that the $123,000 a year gross profit comes out [derived from Burgermeister sales], it means bankruptcy. If I cut back and go to a driver-sales organization, I won't be able to compete properly with the other wholesalers in the market. I might be able to find a buyer for the balance of the business, I might be able to merge or something. At this time I just don't know. I am lost. There isn't much hope for me as it now stands." (4 R 59)

Petitioner Rossi Distributing Co. has been a distributor of various beverages in San Francisco from at least 1953 to the present. (1 R 29) On May 1, 1969, it became a distributor of the Burgermeister and Schlitz brands of beer. (1 R 29) Prior to that time, Schlitz had been operating a company owned branch for some 12 years for distribution of its prod-

ucts in San Francisco. Mr. Charles Stidham, Sales Manager of the Pacific Division of Schlitz, testified that he decided to appoint Rossi as an independent distributor of Schlitz and Burgermeister brands in San Francisco "because the branch was being operated by Schlitz Brewing Company unprofitably, and I wanted to appoint a wholesaler in order to eliminate the loss." (5 R 135) Mr. Stidham further testified that he evaluated a number of wholesalers and selected Rossi "because I thought he could do the best job in San Francisco." (5 R 135) In consideration for the Schlitz and Burgermeister lines, Mr. Rossi increased the size of his operations and agreed to invest in a bigger warehouse. (5 R 179) At the time of the hearing, Rossi had 29 trucks and 60 persons working for him. (5 R 180) Mr. Rossi testified that the effect of the loss of the Burgermeister line, constituting about 23% of the sales of his business, "means it cripples you, period. Might be as much as going out of business. I have got a big overhead." (5 R 185)

Madera Beverage Co. was a Burgermeister distributor in Madera County from 1947 until November 1969. At the time of the hearing, approximately 40% of its total sales were of the Burgermeister label. (3 R 5-6) In addition to Mr. Mario Rossi, his daughter, son-in-law and one other person were active in the business at the time of the hearing. (3 R 18) Mr. Mario Rossi testified that several years prior to the hearing, Schlitz asked him to break somebody into the business on account of his age and that as a result of this request he asked his son-in-law to go

to work for him. (3 R 19) Mr. Mario Rossi testified that the loss of the Burgermeister line will mean, "I will definitely have to go out of business."[15] (3 R 15)

Marino Distributing Co., located in Sonoma, California, has been distributing Burgermeister in a portion of Sonoma County from 1952 to November 1969. (3 R 24-25) At the time of the hearing, Burgermeister represented 70% of its total sales and Schlitz represented the balance. (3 R 24) Five years prior to the hearing, Milton Marino, owner of Marino Distributing Co., had a back injury. Since then, his son, Gerald, has taken it over and does all the work "from putting up signs, delivering the beer, ordering the beer, warehousing it, unloading the trucks, loading the trucks, calling on the trade, putting up materials, cleaning the tap lines. The whole works." (3 R 5) Marino Distributing Co. services 67 out of 72 accounts in its area. The District Manager of Schlitz came out to Marino Distributing Co.'s territory sometime in the latter part of 1968, checked the trade and congratulated Gerald Marino on what he was doing. (3 R 25-28) Gerald's father's main source of income is from this business. (3 R 46-47) Gerald Marino testified that the loss of Burgermeister would have the following effect on Marino Distributing Co.: "Well, my father has his money tied up in the warehouse and the truck and forklift and the walk-in box, and of course, selling three thousand cases [of Schlitz per year], we are finished. It's all over." (3 R 46)

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[15] At the present time, Mr. Mario Rossi is no longer in business, having sold off his physical assets.

(e) The Industry

The six largest sellers of beer in California during the years 1964 through 1968 are, in order of their rank, Adolph Coors Co., Olympia Brewing Co., Anheuser-Busch, Jos. Schlitz Brewing Co., Theo. Hamm Brewing Co. and General Brewing Corporation.[16] (Plt. Exs. 36, 38 and 40 not admitted in evidence, 5 R 195-96.) In each of the years from 1964 through 1968, the four leading breweries increased their total share of the California market as follows (Plt. Exs. 36, 38, 40):

1964 — 50.7%
1965 — 55.3
1966 — 57.6
1967 — 60.5
1968 — 64.4

In each of the years from 1964 through 1968, the six leading breweries increased their total share of the California market as follows (Plt. Exs. 36, 38, 40):

1964 — 71.7%
1965 — 75.9
1966 — 78.8
1967 — 79.5
1968 — 80.4

Three years prior to the hearing on petitioners' motion for a preliminary injunction, there were 350 independent wholesale distributors of beer in Cali-

[16]Plaintiffs' Exhibits 36, 38 and 40 are statistical tables showing sales of beer in California by brewers and by years. These were prepared by the California Brewers Association, compiled from figures supplied by California state agencies. They are of the same type utilized by the Court in *United States v. Jos. Schlitz Brewing Co., supra* at 160. Respondent would not stipulate to their admission into evidence and the Court had requested petitioners to complete the hearing by November 25, 1969, which prevented petitioners from calling the necessary witnesses to authenticate them.

fornia who performed the functions of carrying an inventory and serving the retail trade. At the time of the hearing, there were only 276 such distributors—representing a net decrease of 74. (5 R 155-56) *Appendix* G to this petition is a reproduction of plaintiffs' Exhibit 34 prepared by Mr. Paul De Nio, Assistant Executive Secretary of the California Beer Wholesalers' Association. This exhibit, a report on 37 independent California beer distributors who went out of business during the years 1967 through 1969, was not admitted into evidence by the District Court solely upon the ground that it was irrelevant. (5 R 193-94) It shows that in the years 1967 through 1969, sixteen independent wholesale beer distributors went out of business in Los Angeles County alone. Ten of the sixteen which went out of business did so in 1969. Mr. De Nio testified that the loss of these sixteen distributors has reduced the total number of distributors in Los Angeles County from 55 three years ago to 39 at the time of the hearing. (5 R 155-56) This exhibit further shows that Somerset Distributors, which took over the Burgermeister line from petitioner Bay Beverage, Inc. and from Banner Distributing Co., acquired Beach Beverage, distributors of Pabst, Blatz and Eastside, on November 1, 1969. This exhibit also shows that M & T Distributing and Diel Bros. (owned by the same family which owns D & D Beverage Co., which took over the Burgermeister line from petitioner Ricchetti and from Madera Beverage Co.) (1 R 48) acquired the lines handled by Fresno Beer Distributors (Schlitz, Pabst) and Delta Distributing Co. (Lucky, Falstaff) in 1969.

(f) The Availability of Competitive Products

In the year 1968, there were only five other brewers that sold more beer in California than Schlitz sold of the Burgermeister brand: Adolph Coors Co., Olympia Brewing Co., Anheuser-Busch, Theo. Hamm Brewing Co. and General Brewing Co. (Plt. Ex. 36) There were five other brewers who sold 2% or more of the California beer market but less than 5.5% (Burgermeister's share of the California market): Jos. Schlitz Brewing Co., Maier Brewing Co., Pabst Brewing Co., Miller Brewing Co. and Falstaff Brewing Corp. (Plt. Ex. 36) Each of these brewers, except Maier, utilize independent wholesale distributors to distribute their products in the area served by petitioners. (2 R 56-57) (4 R 56-57, 59-60) (5 R 170-71) Maier Brewing Co. brews beer under a very large number of private labels for chain stores and anyone else who wants to buy beer. Meister Brau's counsel asked Mr. Gerald Marino, son of the owner of Marino Distributing Co., why he didn't order beer from Maier Brewing Co. to replace his lost Burgermeister sales. Mr. Marino replied, "You can't do it. You can't live on those off-brands." (3 R 53) Asked why not, Mr. Marino replied:

> "Because they don't have the advertising behind it. There is no call for it. You are starting from scratch and putting in some labels, when the breweries spend millions of dollars for advertising on television, and they constantly see this label in front of them, and you are competing with them. You would be completely wiped out." (3 R 53)

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals in this cause is in direct conflict with the applicable decisions of this Court on the standards to be applied under Section 7 of the Clayton Act; it does a grave injustice to petitioners and all independent wholesale distributors throughout the United States, who are being very seriously injured by the unprecedented merger movement in concentrating the economic resources of this country in the hands of a few; and it virtually eliminates the possible effectiveness of the private action as a means for enforcing the basic purpose of the 1950 Celler-Kefauver Anti-Merger Act. In addition, this case raises the following important questions of federal law which have not been, but should be settled by this Court: (1) If the acquisition of assets by a former competitor results in the use of the assets so acquired in such a fashion that competition in a line of commerce is substantially lessened, may the victims of such anticompetitive use seek injunctive relief against its continuation? (2) In particular, is such relief available to persons who are injured as a result of violations in the terms and representations governing a divestiture ordered by a federal court? (3) Under the antitrust laws, is a distributor who has developed and promoted the good will of a manufacturer's product entitled to sell this good will to an acceptable purchaser or be compensated for it when the manufacturer agrees to transfer the distribution rights to this product to another distributor?

1. The Applicable Standards Under Section 7

The Court of Appeals considered petitioners' termination as distributors of the Burgermeister brand of beer as a refusal to deal case, not as a Section 7 case, stating, "Termination of a distributorship does not become a violation of Section 7 simply because the manufacturer or supplier taking such action has recently been involved in a merger or acquisition of stock or assets with another company." *Appendix* D, p. xiii. Thus, according to the Court of Appeals, the standards to be applied are whether or not "Meister Brau's selection of its distributors was conditioned on requirements of any acts to be done by the [petitioners] which would enable Meister Brau to gain any undue competitive advantage over other beer producers" citing exclusive dealing arrangements, territorial and customer restrictions and price fixing. *Appendix* D, p. x, fn 4. These are, of course, violations or possible violations of other provisions of the antitrust laws than Section 7.[17] Thus, in the eyes of the Court of Appeals, the adverse effect on the business of the distributor as a result of a merger or acquisition of assets is immaterial in the absence of any arrangement restraining trade or competition such as the aforementioned *Appendix* D, p. xi.

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[17]Exclusive dealing arrangements may violate Section 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §14, if they "substantially lessen competition or tend to create a monopoly in any line of commerce." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). Territorial and customer restrictions on resale are *per se* violations of Section 1 of the Sherman Act, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §1. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). Price fixing is a *per se* violation of Section 1 of the Sherman Act. *Albrecht v. The Herald Co.*, 390 U.S. 145, 151 (1968).

As a result of the treatment of this case as a refusal to deal situation, the Court of Appeals and the District Court totally ignored the factors relevant to a judgment under Section 7 as set forth by this Court in *Brown Shoe Co. v. United States*, 370 U.S. 294, 316-323 (1962). Thus, the evidence presented by petitioners of the trend toward concentration in the wholesale distribution of beer in California (Plt. Ex. 34) was rejected by the District Court solely upon the ground that it was irrelevant—despite the fact that petitioners read to the District Court, before it ruled on the admissibility of Plt. Ex. 34, this Court's holding in *United States v. Pabst Brewing Co.*, 384 U.S. 546, 553 (1966), that "a trend toward concentration in an industry, *whatever its causes*, is a *highly* relevant factor in deciding how substantial the anti-competitive effect of a merger may be." (emphasis added) (5 R 193-94)

The evidence presented on the local market of each of the petitioners,[18] the trend toward a small number of large independent wholesaler beer distributors in

[18]Each of the local markets served by petitioners is an economically significant section of the country for the purposes of §7. Petitioner Ricchetti serves Tulare and Kings Counties. Petitioner Bay Beverage, Inc. serves the City of Long Beach and certain other harbor cities in Los Angeles County. Petitioner Rossi serves the City and County of San Francisco. *Brown Shoe Co. v. United States, supra* at 339 (cities and their environs with a population exceeding 10,000). The effect on competition will be direct and immediate in each of the aforesaid geographical areas as a result of Meister Brau's action in terminating petitioners. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963). Commercial realities in the wholesale distribution of beer make clear that it is a localized business. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 90 S.Ct. 2035, 2043 (1970). See *United States v. Pabst Brewing Co., supra* at 449-50.

each of those markets and the fact that the elimination of petitioners in their local markets will mean that the four or five remaining distributors in each market will increase their share and control of the market from 10.8% to 30.7%"[19] was unpersuasive both to the District Court and the Court of Appeal despite this Court's holdings in *United States v. Pabst Brewing Co., supra at 550* and *United States v. Von's Grocery Company*, 384 U.S. 270, 272 (1966), that in industries characterized by steady trends toward fewer and fewer owner-competitors, mergers or acquisitions resulting in concentrations of 4.49% and 7.5% are proscribed by Section 7.

The evidence presented on the effect of the loss of the Burgermeister line by petitioners and their ability to compete with the lines they handled for other breweries was considered immaterial by the Court of Appeals despite the fact that it was just such evidence upon which the Court in *United States v. Jos. Schlitz Brewing Co., supra* at 142, concluded that:

> "The changes in its distributor organization that Schlitz effectuated after it acquired the assets of Burgermeister resulted in a substantial lessening of competition and a tendency to create

[19]Prior to his termination as a Burgermeister distributor; petitioner Ricchetti distributed various brands of beer which constituted 17.9% of the California market; petitioner Bay Beverage, Inc. distributed brands of beer which constituted 12.8% of the California market; petitioner Rossi distributed brands which constituted 20.4% of the California market; Madera Beverage Co. distributed brands which constituted 30.7% of the California market; and Marino Distributing Co. distributed brands which constituted 10.8% of the California market. (2 R 53; 4 R 41; 1 R 51; 3 R 4-5; 3 R 24) (Plt. Ex. 36)

a monopoly in the production and sale of beer in the Eight Western States area and in California." (Finding 119)

Both at the District Court and at the Court of Appeals, petitioners strenuously attempted to show the parallel between what occurred to the Burgermeister and Schlitz distributors after Schlitz acquired Burgermeister in December 1961 and what occurred to the Bugermeister and Meister Brau Lite distributors after Meister Brau was given the approval to acquire Burgermeister in July 1969.

In *United States v. Jos. Schlitz Brewing Co., supra* at 141 (Finding No. 108), Judge Weigel found that when Schlitz acquired Burgermeister, it was able to choose between the Schlitz and the Burgermeister wholesalers and was thus able to strengthen its wholesaler organization by choosing the more effective of the two wholesalers.[20] In the instant case, when Meister Brau was authorized to acquire Burgermeister, it was able to choose between the Meister Brau Lite and the Burgermeister wholesalers and it claims it was able to strengthen its wholesaler organization by choosing the more effective of the two wholesalers for the distribution of Meister Brau Lite beer (a premium brand) and Burgermeister beer (a

[20]In the year (1961) preceding the acquisition of Burgermeister by Schlitz, Burgermeister was the fifth largest selling brand in California with 8.5% of the California market and Schlitz was the tenth largest selling brand in California with 3.6% of the California market. In the year (1968) preceding the acquisition of Burgermeister by Meister Brau, Burgermeister was the sixth largest selling brand in California with 5.5% of the California market, and Schlitz was the seventh largest selling brand in California with 5.3% of the California market. *United States v. Jos. Schlitz Brewing Co., supra* at 178; Plt. Ex. 36.

regional or popular priced brand). Thus, Meister Brau, like Schlitz, was attempting to find the most effective wholesaler to carry its full line of products.

In *United States v. Jos. Schlitz Brewing Co.*, *supra* at 141 (Finding No. 109), Judge Weigel found that in the first six months following the acquisition of Burgermeister, Schlitz terminated its relationship with eight Burgermeister distributors and 23 Schlitz distributors in California. In the instant case, when Meister Brau acquired Burgermeister, it terminated its relationship with seven Burgermeister distributors and an untold number of Meister Brau Lite distributors in California.

The Court in *United States v. Jos. Schlitz Brewing Co.*, *supra* at 141, 148-49, found that the distributors who lost Burgermeister or Schlitz were less effective distributors for other brewers. The overwhelming evidence in the instant case shows that petitioners will be less effective distributors for other brewers as a result of their loss of the Burgermeister line.

It was on the basis of the above changes in its distributor organization that Schlitz effectuated after it acquired Burgermeister that the Court concluded that there was a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. *United States v. Jos. Schlitz Brewing Co.*, *supra* at 142 (Finding No. 110). It is on the basis of the above changes in its distributor organization that Meister Brau effectuated at the time it acquired Burgermeister, including the tremendous disruption caused by the last minute notifi-

cation to petitioners, that petitioners contend there was a substantial lessening of competition and a tendency to create a monopoly in the wholesale distribution of beer in California and in each of the geographical markets served by petitioners.

Petitioners did not contend at the District Court nor at the Court of Appeals that the acquisition by Meister Brau of the Burgermeister assets as approved by Judge Weigel on July 23, 1969, violated Section 7 because at the time of the July 23, 1969, hearing, Meister Brau Lite beer was in actual competition with the Burgermeister beer through its being distributed in most instances by different distributors. In addition, the president of Meister Brau assured Judge Weigel at the July 23, 1969, hearing that Meister Brau intended to "establish", "maintain", and "solidify" its relationship with the existing independent wholesale distributors of Burgermeister beer.

It is only when Meister Brau betrayed its representations to Judge Weigel and ended competition between Meister Brau Lite beer and Burgermeister beer through the appointment of single distributors to handle both brands that petitioners claim Meister Brau ran afoul of Section 7, which was intended "to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at any time after the acquisition, depending upon the circumstances of the particular case." *United States v. E. I. du Pont de Nemours & Company*, 353 U.S. 586, 596-98 (1957).

The profound tragedy of this case is that the important lessons taught by the *Schlitz* case and the representations of Meister Brau's president to Judge Weigel were permitted to be cast aside with impunity by Meister Brau.

2. The Merger Movement and the Private Action

The American economy is experiencing a major change in industrial organization as the result of a merger movement of unprecedented dimensions. For nearly two decades mergers have been increasing. During the years 1967 and 1968 and early in 1969 they have reached all-time peaks.[21] FED. TRADE COMM'N ECONOMIC REPORT ON CORPORATE MERGERS 29 (1969). This has occurred despite an unprecedented streak of successes by the government in challenging mergers.[22] These developments pose a serious threat to America's democratic and social institutions by creating a degree of centralized private decision-making that is incompatible with a free enterprise system, a system relying upon market forces to discipline private economic power.

Accompanying this growth in the centralization of economic power has been a parallel growth in the use of franchising in the distribution of goods and

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[21] Acquired manufacturing and mining assets averaged about $5 billion annually during 1965 and 1966, rose to $10 billion in 1967, and to $15 billion in 1968. Early in 1969, acquisitions reached an annual rate of over $20 billion. FED. TRADE COMM'N ECONOMIC REPORT ON CORPORATE MERGERS 4 (1969).

[22] Between 1950 and 1965, the federal enforcement agencies filed 143 Section 7 complaints. B. BOCK, MERGERS AND MARKETS 9 (4th ed. 1965). Between 1950 and 1966 there were 183,504 business mergers. 34 ABA ANTITRUST L.J. 105.

services in the marketplace.[23] It is estimated that $70 to $91 billion worth of goods and services are sold annually through franchise arrangements, that franchising accounts for 10 percent of the gross national product and 25 percent of all retail sales and that some 400,000 businessmen are franchisees. *Hearings on S. 2507 and S. 2321 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 1 (1967). Thus, on the one hand you have larger and larger increases in the economic power of the manufacturers and producers and, on the other hand, you have a proliferation of small independent businessmen distributing their products. Because these distributors and franchisees are "independent contractors", the manufacturers and producers pay no workmen's compensation, social security taxes, income taxes, overtime pay, vacation pay, unemployment compensation benefits, retirement contributions, etc., on their behalf. These small businessmen are denied recognition under the Labor Management Relations Act[24] and therefore have no

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[23]Franchises are essentially arrangements under which the owners of trademarks or copyrights license others, under specified conditions or limitation, to use those trademarks or copyrights in purveying goods or services. They are of three general types: (1) Those that are primarily concerned with a method of distributing the franchisor's products—such as in the automobile industry, the petroleum industry and the instant beer industry; (2) those that establish retail outlets where the franchisor is principally selling a name and method or format of doing business—such as in the fast food industry, motel operations and servicing organization; and (3) those that establish manufacturing or processing plants—such as in the soft drink field and the baking industry. Fed. Trade Comm'n Report of Ad Hoc Committee on Franchising 8 (1969).

[24]Section 2(3) of the Labor Management Relations Act, 61 Stat. 137 (1947), 29 U.S.C. §152(3), exempts "independent contractors" from the definition of employee.

effective union to represent their interest. Thus, the only thing that stands between them and absolute domination by the manufacturers and producers are the antitrust laws of the United States. Thus, while some are claiming that traditional antitrust policy is obsolete,[25] the fact of the matter is that petitioners and others like them rely upon the antitrust laws as their only real protection from total economic exploitation. It is for this reason that it is most urgent that this Court make clear the legal rights of these small businessmen under Section 7 when the mergers and acquisitions of the manufacturers and producers threaten and injure them.

In *FTC v. Dean Foods Company*, 384 U.S. 597, 615 (1966), Mr. Justice Fortas, in a dissenting opinion joined in by Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White, wrote:

> "The Clayton Act contains specific and comprehensive enforcement provisions. There is no vacuum to be filled by ingenuity. There is no room for improvisation. The Act is fully armed with a triple arsenal. Enforcement powers with respect to mergers under § 7 are vested in the Department of Justice, the Federal Trade Commission and *private persons who claim injury as a result of the merger*. Both the Department of Justice and *private litigants* are authorized to seek injunctive relief in the district courts." (emphasis added)

This Court has time and time again indicated that, "Congress has encouraged private antitrust litigation not merely to compensate those who have been directly

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[25]GALBRAITH, THE NEW INDUSTRIAL STATE (1967).

injured but also to vindicate the important public interest in free competition. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 496, 502 (1969); *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 138-39 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1962); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951).

To date, the number of private antitrust injunctive actions challenging a merger or acquisition of assets has been few and far between and almost always involved the case of a corporate takeover being resisted by the management of the company sought to be acquired. *American Crystal Sugar Co. v. The Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969); *Muskegon Piston Ring Co. v. Gulf & Western Indus., Inc.*, 328 F.2d 830 (6th Cir. 1964); *Crane Co. v. Briggs Mfg. Co.*, 280 F.2d 747 (6th Cir. 1960); *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*, 303 F. Supp. 1344 (S.D.N.Y. 1969); *Filtrol Corp. v. The Slick Corp.*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,035, at 88,048. The number of private antitrust cases involving terminated distributors and franchisees resulting from mergers and acquisitions have been almost nonexistent. *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521 (S.D. N.Y. 1965) (§ 7 cause of action upheld); *Kirihara v. The Bendix Corp.*, 306 F. Supp. 72 (D. Hawaii 1969) (no standing to maintain § 7 cause of action).[26] Yet, it

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[26] See *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

is in this area that the small businessman is being so severly injured.

Accordingly, if the basic purpose of the 1950 Celler-Kefauver Act "to prevent economic concentration in the American economy by keeping a large number of small competitors in business" is to be truly realized, then this Court must make loud and clear the rights of small businessmen to challenge under Sections 7 and 16 of the Clayton Act the mergers that threaten to injure and destroy them. *United States v. Von's Grocery Co., supra* at 275.

In the instant case, the injunctive relief sought by petitioners was specifically designed to promote competition—not restrict it. Thus, if Meister Brau so desired, it could appoint other distributors to sell Burgermeister beer in petitioners' territory in competition with petitioners—thereby creating intraband competition. All that petitioners sought as permanent injunctive relief was the right to continue to buy Burgermeister beer and not be terminated "except for good cause, with at least 90 days' advance notice, and with the opportunity to sell their Burgermeister assets to an acceptable purchaser." (1 R 11)

3. The Divestiture of Burgermeister

In *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135 (1967), this Court made clear the right of a private party to intervene under Rule 24 of the Federal Rules of Civil Procedure in a divestiture proceeding when it can be shown that he has an interest relating to the property or transaction and is so

situated that existing parties cannot adequately safeguard his interest. In *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 665 (1941), this Court held that "where the enforcement of a public law also demands distinct safeguarding of private interest by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion."

Thus, under this Court's rulings in *Cascade Nat. Gas Co. v. El Paso Nat. Gas Co., supra,* and *Missouri-Kansas Pipe Line Co. v. United States, supra,* there is no question that petitioners could have intervened in the July 23, 1969, divestiture proceeding, especially in light of the fact that the protection of competition at the "important wholesaler level in the beer industry" was at the heart of the controversy surrounding Schlitz' acquisition of Burgermeister.[27] *United States v. Jos. Schlitz Brewing Co., supra* at 149.

To preclude the possibility of such intervention, Schlitz and Meister Brau agreed, as part of the terms of purchase, not to release or cause to be released any publicity concerning the transaction prior to its approval by the District Court. On July 23, 1969, the attorneys for Schlitz, Meister Brau, the government and General Brewing Co. showed up in Court to have the sale approved on the meager basis of the option agreement, two annual reports of Meister Brau, some recent statistics about Burgermeister, and affidavits.

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[27] In *United States v. Pabst Brewing Co.*, 303 F.Supp. 1400, 1402 (E.D. Wis. 1969) the purchaser, Heileman, of the Blatz assets assumed the Blatz distributor agreements pursuant to the divestiture of Blatz by Pabst.

Judge Weigel was not to be bought off so easy. He insisted on the testimony of the president of Meister Brau, stating, "But this decree was not entered lightly. I think we ought to have something in here to indicate—if there isn't anything before the Court, I would like to know what there is that will show that the Burgermeister assets are going to be used as a viable competitor in the sale and production of beer." (Plt. Ex. 19, p. 9.) Fortunately, the president of Meister Brau was in San Francisco on July 23, 1970, and after a short recess, he was called to testify.

At this July 23, 1969, hearing, the Court questioned the president of Meister Brau about its plans for the marketing and distribution of Burgermeister beer. He assured the court that the existing Burgermeister distribution network was satisfactory for Meister Brau to commence operations, informed the court that he realized that the Burgermeister volume represented a fairly significant volume for most of the distributors that were handling it and represented to the court that Meister Brau intended to establish, solidify and maintain its relationship with the Burgermeister distributors. (Plt. Ex. 19, pp. 19-20, 29-30.) Three subsequent letters written by the president and senior vice president of Meister Brau to petitioners and the other Burgermeister distributors affirmed these representations. (Plt. Exs. 3, 4, 5.) Then, upon the hiring of Mr. Edward Kaleff, Meister Brau betrayed these representations.[28]

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[28]The opinion of the Court of Appeals provides that there was "evidence in the record from which the District Court could properly have found that the termination of the appellants as dis-

Petitioners maintain that the violation by Meister Brau of its representations to Judge Weigel in connection with its purchase of the Burgermeister assets from the Jos. Schlitz Brewing Co. entitled them to the equitable relief prayed for in their complaint. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., supra* at 136-37; *Utah Public Service Comm'n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 467 (1969).

4. Meister Brau's Confiscation of Petitioners' Property

Meister Brau entered into agreements with various independent distributors to appoint them as exclusive distributors of the Burgermeister brand of beer in petitioners' territories without granting petitioners the opportunity to sell and transfer to an acceptable purchaser the goodwill that they developed for the Burgermeister brand of beer. Petitioners alleged in their complaint that this taking of petitioners' property without

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tributors was based on an evaluation of the physical facilities, transportation equipment, personnel, and past sales records of each of the [petitioners], rather than on any trade-restraining requirements imposed on the [petitioners]." The District Court made no findings on the reasons for the terminations. The evidence in the record was just as strong that the terminations resulted from Mr. Kaleff's predilections and personal problems. From January 1965 to early 1969, Mr. Kaleff was an independent distributor of beer in the San Fernando Valley area of Los Angeles County. (1 R 37) Mr. Kaleff *sold* his distributorship leaving a debt to Lucky Lager Brewing Co. of approximately $25,000, which had not been paid at the time of hearing on petitioners' motion for a preliminary injunction. (5 R 74) From 1958 to January 1965, Mr. Kaleff was with the Pabst Brewing Co. in California as head of sales for the eleven western states. (1 R 37; 5 R 73) Mr. Kaleff left Pabst as a result of "some difficulties." (5 R 71) However, the reasons for petitioners' terminations are irrelevant. Mergers and acquisitions cannot be justified upon the alleged grounds of technical efficiency and social benefits, which is generally not the case. NELSON, MERGER MOVEMENTS IN AMERICAN HISTORY 1895-1956 (1959).

just compensation violated Section 1 of the Sherman Act. (1 R 7-10) Petitioners, however, did not raise this issue on their motion for a preliminary injunction and on the appeal from the denial of the preliminary injunction. Petitioners, however, contend that this is properly before this Court as a result of the decision of the District Court to dismiss petitioners' complaint with prejudice and the holding by the Court of Appeals that petitioners have failed to establish "their right to relief under traditional refusal-to-deal principles evolved under other provisions of the antitrust laws." (*Appendix* D, p. xiii.)

In *United States v. Arnold Schwinn & Co., supra* at 376, this Court indicated that a manufacturer may, if other competitive products are available in the market, appoint "certain dealers to whom, alone, he will sell his products." This Court also stated in *Arnold Schwinn* at 379:

> "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale."

In the instant case, due to the intense concentration in the brewing industry (Top 6 brewers have 80.4% of the California market), there are no competitive products available to petitioners to replace their lost Burgermeister sales. The goodwill that petitioners established for the Burgermeister brand with their customers over a great many years (with the exception of petitioner Rossi) cannot be replaced by petitioners. This goodwill has a great value and beer distributors are bought and sold in California for far in excess of their physical asset value. Mr. Kaleff testified that he sold his distributorship (which handled the Hamm's Lucky Lager, Colt 45 and Heineken's lines) for the value of the assets, which he could not recall, plus $10,000 for an agreement not to compete. (5 R 73-74)

The actions of Meister Brau in terminating petitioners and appointing other distributors in their place is nothing more than the forced transfer, without compensation, of petitioners' goodwill assets to a third party, in violation of Section 1 of the Sherman Act. As stated by Mr. Rufus E. Wilson, former Chief, Division of General Trade Restraints, Federal Trade Commission, to the 32nd annual convention of the National Beer Wholesalers' Association:

> "On the basis of the *Schwinn* case, it could be argued that when a manufacturer unreasonably refuses to permit a transfer of the business, including the good-will built by a distributor, he has exerted an unlawful restraint upon the distributor's freedom to dispose of his business to a qualified purchaser under his own terms."[29]

[29] BEER WHOLESALERS' NEWS, Nov. 1969, Vol. 21, No. 10.

Petitioners submit that Mr. Wilson's contention is the solution for eliminating the agonizing problem which invariably arises when a distributor or franchisee has his business totally destroyed by a manufacturer or producer's decision to terminate him.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, December 7, 1970.

Respectfully submitted,

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
W. THOMAS AMEN,
Attorneys for Petitioners.

STEFAN A. RIESENFELD,
Of Counsel.

(Appendices Follow)

Appendix A

In the United States District Court
Northern District of California

No. C-89-389 GBH

Joseph A. Ricchetti, et al.,
Plaintiffs,

vs.

Meister Brau, Inc., a corporation,
Defendant.

ORDER

Denying Motion for Preliminary Injunction

Plaintiffs' motion for preliminary injunction having come on regularly to be heard before the above entitled Court, the Honorable George B. Harris, Chief Judge, United States District Court, presiding; plaintiffs having been represented by G. Joseph Bertain, Jr., Esq. and Timothy H. Fine, Esq., defendant having been represented by Brobeck, Phleger & Harrison, Richard Haas, Esq. and Moses Lasky, Esq. appearing; and the Court having considered the affidavits on file, supplemental oral testimony and the exhibits introduced in association with said testimony, and the matter having been argued by the respective parties and submitted; and the Court being fully advised;

The Court finds and, accordingly, It Is Ordered:

(a) That there are no equitable considerations which would prompt this Court to grant injunctive relief herein;

(b) That there is no reasonable probability from the testimony and evidence presented that the plaintiffs will ultimately prevail on the merits in the above entitled cause;

(c) That there is no asserted *status quo* to preserve allegedly existing between plaintiffs and defendant. Plaintiffs' motion for preliminary injunction seeks to impose a *new status* as between the parties;

(d) That there is no showing of irreparable injury which would occur during the pendency of the action;

(e) That the motion for a preliminary injunction is without merit and the same is hereby denied.

It Is Further Ordered that the temporary restraining order heretofore made and entered on the 14th day of November, 1969, be, and the same hereby is vacated, annulled and set aside.

Dated: November 26, 1969.

s/ George B. Harris
United States District Judge

Filed November 26, 1969,
C. C. Evensen, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 25,123

Joseph A. Riccbetti, et al.,
Plaintiffs and Appellants,

vs.

Meister Brau, Inc., a corporation,
Appellee.

ADVICE TO COUNSEL.

Before: Chambers and Merrill, Circuit Judges, and Taylor, District Judge.

Counsel for both parties at oral argument indicate a willingness to agree that the order denying a temporary injunction be considered a decree denying a permanent injunction.

If counsel are so minded, this court will welcome the parties going to the district court and there soliciting a decree from the district court (on the record now before that court) on the issue of a permanent injunction. If the injunction be again denied, the court will welcome a new appeal and stipulation that the record and briefs in the present case may be the

record and briefs in the new appeal and that the case be immediately submitted for division.

It is suggested that all of the foregoing can be completed in seven days.

No new cost bond need be filed.

Filed February 25, 1970.
Wm. R. Lurk, Clerk.

Appendix C

United States District Court
Northern District of California

Civil No. C-69-389 GBH

Joseph A. Ricchetti, et al.,
Plaintiffs,

vs.

Meister Brau, Inc., a corporation,
Defendant.

JUDGMENT OF DISMISSAL.

The parties having by written stipulation filed in the cause submitted this suit for final determination on the entire record made at the hearing of plaintiffs' motion for a preliminary injunction.

It Is Hereby Ordered, Adjudged and Decreed that none of the plaintiffs, Joseph A. Ricchetti, doing business as Kings County Distributing Co., Bay Beverage, Inc. and Louis C. Rossi doing business as Rossi Distributing Co. is entitled to any relief against defendant Meister Brau, Inc., and plaintiffs' complaint is hereby dismissed with prejudice and with costs to defendant taxed in the sum of $.....

Dated: March 3rd, 1970.

/s/ George B. Harris
United States District Judge

Filed Mar. 3, 1970.
C. C. Evensen, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 25,305

Joseph A. Ricciotti, individually and dba Kings County Distributing Co.; Bay Beverage, Inc., a corporation; Louis C. Rossi, individually and dba Rossi Distributing Co.; on behalf of themselves and all other Burgermeister beer distributors similarly situated,

Appellants,

vs.

Meister Brau, Inc., a corporation,

Appellee.

[September 11, 1970]

Before: Chambers and Merrill, Circuit Judges, and Taylor, District Judge.*

Taylor, District Judge:

This private antitrust action was brought by three wholesale beer distributors against the appellee

*Hon. Fred M. Taylor, United States District Judge, for the District of Idaho, sitting by designation.

Motive Iron, Inc., seeking to enjoin the appellee from terminating the status of the appellants as distributors of Interwoven wire. Federal jurisdiction is invoked under Section 16 of the Clayton Act, 38 Stat. 737 (1914), as amended, 15 U.S.C. § 26, and jurisdiction on appeal is conferred by Title 28, U.S.C. § 1291.

The appellants only sought injunctive relief in the District Court, praying for a temporary restraining order and preliminary injunction enjoining the attempted termination of the appellants as distributors pending a final adjudication of the action on the merits, and for a permanent injunction against such termination except for good cause and with appropriate notice. The District Court issued a temporary restraining order, but after an extensive hearing on the motion for preliminary injunction, denied the motion and vacated the temporary restraining order. An appeal was taken to this Court from the denial of the motion for preliminary injunction. Following oral argument on the appeal, the proceedings were remanded to the District Court by agreement of counsel and on the advice of this Court, for a decree by the District Court on the issue of the permanent injunction. By stipulation of the parties, the issue of the permanent injunction was submitted to the District Court on the record made on its prior hearings on the motion for preliminary injunction. On March 3, 1970, the District Court entered its judgment denying any relief to the appellants, and dismissed the action with prejudice, from which judgment the present appeal is perfected. We affirm.

The facts underlying this litigation are not in substantial dispute. On December 29, 1961, the Schlitz Brewing Company purchased the assets of Burgermeister Brewing Company. In 1964, the United States filed suit against Schlitz, alleging a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. After trial on the merits, the United States District Court for the Northern District of California entered judgment holding that the acquisition violated the Clayton Act.[1] The final judgment and decree ordered Schlitz to divest itself of the Burgermeister assets. In 1969, the District Court approved an agreement between Schlitz and Meister Brau, appellee herein, for the sale to Meister Brau of the Burgermeister assets. The appellee is a corporation engaged in the production and sale of beer. The sale of the Burgermeister assets was consummated in November, 1969.

On November 4, 1969, a meeting was held by Meister Brau's officers to determine which distributors, including those who had distributed Burgermeister beer for the Schlitz corporation, would be appointed for distribution of Burgermeister beer. Following this meeting, Meister Brau informed the three appellant corporations and five other distributors that after November 17, 1969, they would no longer be appointed as Burgermeister distributors. Other distributors, including some who had not previously handled Burgermeister beer, were appointed

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[1] *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966) aff'd mem., *Jos. Schlitz Brewing Co. v. United States*, 385 U.S. 37, 87 S.Ct. 200, 17 L.Ed.2d 25 (1966), rehearing denied, 385 U.S. 1021, 87 S.Ct. 702, 17 L.Ed.2d 569 (1967).

to assume the territories served by the terminated distributors. This action followed, seeking to enjoin the termination.

Section 7 of the Clayton Act, 15 U.S.C. § 18, contemplates an action where the effect of an acquisition of stock or assets is to substantially lessen competition or tends to create a monopoly in any line of commerce.[2] The judicially approved acquisition by Meister Brau of the Hauerwasser assets, in and of itself, is not challenged by the appellants. The appellants contend that acts by an acquiring corporation, subsequent to an otherwise valid acquisition, may cause the acquisition to fall afoul of Section 7 if an effect of those acts may be to substantially lessen competition or tends to create a monopoly, and that Meister Brau's termination of the appellants as distributors will force some distributors to go out of business because of the reduced volume of sales, thereby reducing the number of viable competitors in the business of wholesale beer distribution in California. Appellants further contend that there is currently a trend toward concentration in the market of wholesale beer distribution, because the number of

[2] Section 7 of the Clayton Act, 15 U.S.C. § 18, provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * *"

wholesale beer distributors in California has significantly declined in recent years.[3]

The appellants' proposition that subsequent anticompetitive activities may bring an otherwise valid acquisition of corporate stock or assets within the proscriptive scope of Section 7 finds support in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed. 2d 1057 (1957). Beyond the rule of law asserted, however, appellants' reliance on the du Pont case is misplaced. In that case, the Supreme Court found that the du Pont Company, having purchased substantial amounts of General Motors stock, subsequently used the influence of that stock ownership to entrench itself as a primary supplier to General Motors of fabrics, paints and related finishing products used in the automobile industry, which resulted in the diminution of effective competition by other suppliers of those products.

In the instant case, there is neither allegation nor proof in the record that Meister Brau's selection of its distributors was conditioned on requirements of any acts to be done by the appellants which would enable Meister Brau to gain any undue competitive advantage over other beer producers.[4] There was evi-

[3]Appllants argue that the aggravation of this trend, which will result from some of the appellants going out of business, is sufficient to bring this case within the outer limits of anticompetitive concentration established in *United States v. Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed. 2d 765 (1966) and *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed. 2d 545 (1966).

[4]See e.g., *United States v. Jos. Schlitz Brewing Co.*, supra, n.1, 253 F.Supp. at 141-142 (distributors required to distribute only one manufacturer's brands); *United States v. Arnold Schwinn &*

dence in the record from which the District Court could properly have found that the termination of the appellants as distributors was based on an evaluation of the physical facilities, transportation equipment, personnel, and past sales records of each of the appellants, rather than on any trade-restraining requirements imposed on the appellants.

It is well established that a manufacturer or producer has the right to deal with whom he pleases and to select his customers at will, so long as there is no resultant effect which is violative of the antitrust laws. Thus, a manufacturer may discontinue a relationship, or refuse to open a new relationship for business reasons which are sufficient to the manufacturer, and adverse effect on the business of the distributor is immaterial in the absence of any arrangement restraining trade or competition. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed. 2d 1249 (1967); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969); *Seanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918, 921 (9th Cir. 1968); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286-287 (6th Cir. 1963); *Timken Roller Bearing Co. v. Federal Trade Commission*, 299 F.2d 839 (6th Cir. 1962), cert. denied, 371 U.S. 861, 83 S.Ct. 118, 9 L.Ed. 2d 99 (1962); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). In *United States v. Arnold Schwinn & Co.*, supra, 388 U.S. at

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Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed 2d 1249 (1967) (restrictions imposed on territories and retail dealerships); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963) (price fixing).

376, 87 S.Ct. at 1864, the Supreme Court set out the rule, with its limitations, that the manufacturer has a right to choose his dealers:

> "At the other extreme, a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act."

This court has previously held that a manufacturer or supplier has a legitimate interest in the quality, competence and stability of his distributors, and, if dissatisfied with a distributor, may properly sell his product to a more viable competitor. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, supra. Where, as here, a supplier seeks no more than a better equipped and more aggressive distributor for his product, his conduct may in fact be more beneficial than detrimental to competition, and is not condemned by either the Sherman or Clayton Acts. As the antitrust laws do not prohibit a business from fairly entering into a competitive market, neither do they prohibit its improvement of its competitive stature in the product market. *Scanlan v. Anheuser-Busch, Inc., supra* at 921.

We do not agree with the appellants' attempted distinction of the foregoing authorities on the ground that the cases cited were "refusal to deal" or "exclusive agency" cases which involved no acquisition of stock or assets. Termination of a distributorship does not become a violation of Section 7 simply because the manufacturer or supplier taking such action has recently been involved in a merger or acquisition of stock or assets with another company. Cf. *Salerno v. American League of Professional Baseball Clubs*, 39 U.S.L.W. 2073, (2d Cir., July 13, 1970). There must be a further showing that, as a result of the post-merger acts, the merger has an effect on commerce which is proscribed within the meaning of all elements of Section 7. On this record, the appellants have failed to show that their termination as distributors has caused the merger to bear anticompetitive tendencies sufficient to bring such merger within the scope of Section 7.

In the absence of any showing of a violation of Section 7, the appellants must necessarily establish their right to relief under traditional refusal-to-deal principles evolved under other provisions of the anti-trust laws. The authorities heretofore cited amply support our conclusion that in this respect the appellants have also failed to meet their burden.

No error of law appears in the judgment of the District Court, and its conclusions cannot, on this record, be said to be clearly erroneous.

The judgment of the District Court is accordingly Affirmed.

Appendix E

SECTION 1 OF THE SHERMAN ANTITRUST ACT, 15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between

factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

SECTION 7 OF THE CLAYTON ACT, 15 U.S.C. § 18

Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, wherein any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more cor-

porations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the com-

pany owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

SECTION 16 OF THE CLAYTON ACT, 15 U.S.C. § 26

Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

Appendix F

BAY BEVERAGE COMPANY
19400 Susanna Street
Compton, California
(213) 639-7210

Covers Long Beach and surrounding area

Principals

James Straley, Owner
Joe Ren, General Manager
Jim Heard. Sales Manager

Licensee Count

Total Licensees: 1,700
750 off-sale and 950 on-sale
First six months of 1969 barrelage sales minus 21% versus 1968.
Strong military area with 94% distribution off-sale and 20% on-sale.

Brands Presently Distributed

Burgie
Schlitz
Imports

Trucks

Total Trucks: 12
Burgie Truck Paintings: 4

Draft Accounts

Total Draft Accounts: 72
Total Burgie Draft Accounts: 27
Approximate Volume: 550 halves per month

Sales Personnel

Marketing area pre-sold with the exception of one draft sales route in downtown Long Beach.

3 Route Salesmen

Contracted Draft Cleaning Service

Merchandising done by Jim Heard,
Sales Manager

Lee Fichera, Salesman

Joe Rea, General Manager,
services military accounts

All management people work in the field.

Comment and Recommendation

Distributor Rating: Fair

Burgermeister sales approximately 30% of overall business. Warehouse is small but adequate. Recommend we move the Burgermeister brand to Somerset Distributors, Inc., Long Beach.

HLE/jb
10/20/69

SOMERSET DISTRIBUTORS, INC.
1560 West 12th Street
Long Beach, California
(213) 435-0101

Services Long Beach and surrounding area

Proposal letter from general manager for Burgermeister and Meister Brau Lite brands attached.

Principals

Frank Sinatra and Associates, Owner
Bryan Littlefield, General Manager
Axel Brenna, Sales Manager

Licensee Count

Total Licensees: 1,200
700 on-sale and 500 off-sale
(94.5% distribution in on-sale)
Military business in this area is 17% of overall business.

Brands Presently Distributed

Budweiser
Michelob
Busch Bavarian

Trucks

Total Trucks: 34
(In both areas, including Long Beach and Torrance)

Draft Accounts

Total Draft Accounts: 160
(Contracted draft service exclusive for Somerset Distributors. Cleaning service every two weeks.)
Approximate Volume: 3,500 halves per month
Total Package Volume: Approximately 70,000 cases per month

Financial Status

Excellent

Comment and Recommendation

Distributor Rating: Excellent
This distributor to be given Burgermeister brand from Bay Beverage Company, Compton, and Meister Brau Lite brand from Quality Brands Distributing Company, Long Beach.

HLE/jb
10/20/69

Appendix G

PLAINTIFFS' EXHIBIT No. 34 FOR IDENTIFICATION (NOT ADMITTED INTO EVIDENCE) PREPARED BY PAUL DE NIO, ASSISTANT EXECUTIVE SECRETARY, CALIFORNIA BEER WHOLESALERS ASS'N

Nov. 24, 1969—Report of Distributors That Have Gone Out of Business in the Past Three Years:

Los Angeles County

1.	United Beverage 530 Rodier Dr. Glendale, Calif.	Hamm's	March, 1969
2.	Central Beer Dist. 1443 E. Fourth St. Los Angeles, Calif.	Pabst Blatz Eastside	1969
3.	Joseph Stool Co. 950 N. Formosa Los Angeles, Calif.	Hamm's	1969
4.	Eagle Beer Dist. 1601 N. Indiana Los Angeles, Calif.	Hamm's	1967
5.	Globe Bottling Co. 5190 Santa Fe Los Angeles, Calif.	Pabst Miller's	Jan., 1969

The above distributors were taken over by Metro Distributing Co., 550 Mission, Los Angeles, Calif.

6.	City Beverage 717 Date St. Alhambra, Calif.	Pabst Blatz Eastside	1969

Taken over by Pasadena Beverage, 3629 N. Cypress, El Monte, Calif.

7.	Tippet Dist. Co. 10625 Central Montclair	Pabst Blatz Eastside	1969

Taken over by Pomona Valley Dist., 108 S. Pico, Pomona, Calif.

8.	Lawlor Dist. Co. 1326 W. 12th St. Long Beach	Lucky Lager *See No. 13	1968

Los Angeles County

9.	Service Beverage 15405 Coronet Santa Fe Springs, Calif.	Hamm's	1969

Taken over by Hamm's of Downey, 8205 E. Pilot, Downey, Calif.

10.	Southside Dist. 11151 Palmer South Gate, Calif.	Pabst Blatz Eastside	1969

Taken over by Downey Dist., 8100 Nance St., Downey, Calif.

11.	Regal Pale Dist. 1010 Arroya San Fernando, Calif.	Pabst Blatz Eastside	1968
12.	All American Bev. 14340 Arrow Hwy. Baldwin Park, Calif.	Lucky Lager	1968

Taken over by Southland Bev. Dist., 13099 Temple, City of Industry, Calif.

13.	Atlas Beer Dist. 1818 W. 135th Gardena, Calif.	Hamm's	

Number 8 and above taken over by Harbor Dist. Co., 19722 S. Alameda, Compton, Calif.

14.	Westside Dist. Co. 8331 DeCelis Pl. Sepulveda, Calif.	Falstaff	1968

Taken over by Addison Beverage, Burbank, Calif.

15.	Beach Bev. 21801 Vera Torrance, Calif.	Pabst Blatz Eastside	Nov. 1, 1969

Taken over by Somerset Dist., 1560 W. 12th, Long Beach, Calif.

16.	Antelope Valley Dist. 44746 N. Sierra Hwy. Lancaster, Calif.	Budweiser Busch Lucky	1969

Taken over by Foothill Beverage, 1040 Price, Pomona, Calif.

Orange County

17. General Dist. — Schlitz — 1969
711 E. Sycamore
Anaheim, Calif.

Taken over by Southland Beverage Dist., 2002 N. 5th, Santa Ana, Calif.

18. Braden Dist. — Carling — Oct. 29, 1969.
519 Central Pk.
Anaheim, Calif.

San Diego County

19. S. L. Hanson — Hamm's — 1969
250 Fletcher
El Cajon, Calif.

Taken over by John Lenore & Co., 819 W. Elm, San Diego, Calif.

20. L&S Dist. — Miller's — 1969
1643 Newton
San Diego, Calif.

Taken over by H. A. Lavozzi, 8500 Alvarado, La Mesa, Calif.

Ventura County

21. Don Burroughs — Lucky Lager — 1968
Select Brands
2611 Wagon Wheel Rd.
Oxnard, Calif.

Taken over by Pacific Beverage, 35 W. Canon Perdido, Santa Barbara, Calif.

22. Bower Dist. — Pabst
619 Ventura Blvd. — Blatz
Oxnard, Calif. — Eastside

Taken over by Bert Gianelli Dist., 371 Winchester, Oxnard, Calif.

Riverside County

23. Aselin Bev. Co. — Schlitz — 1968
51-686 Hwy. 86
Coachella, Calif.

Aselin Bev. Co. taken over by Southland Bev. Dist., 610 Cantaloupe, Coachella, Calif.

San Bernardino County

24. Best Brands — Lucky — 1968
San Bernardino, Calif.

Taken over by Southland Bev. Dist., San Bernardino, Calif.

San Luis Obispo County

25. Jet Dist. Co. — Hamm's — 1969
202 S. Higuera
San Luis Obispo, Calif.

Taken over by Pacific Beverage, 35 W. Canon Perdido, Santa Barbara, Calif.

Fresno County—Madera County

26. Fresno Beer Dist. — Schlitz, Pabst — 1969
214 Broadway
Fresno, Calif.

Taken over by M&T Dist.-Diel Bros., 2345 Los Angeles, Fresno, Calif.

27. Delta Dist. Co. — Lucky, Falstaff — 1969
3440 E. Tulare
Fresno County, Calif.

Taken over by M&T Dist.-Diel Bros., 2345 Los Angeles, Fresno, Calif.

San Joaquin County

28. Delta Dist. — Lucky, Budweiser — 1969
2245 Marengo
Stockton, Calif.

Taken over by Dawson Dist. Co., 4642 Waterloo, Stockton, Calif.

29. Rishwain Dist. — Pabst — 1969
48 N. Wilson Way
Stockton, Calif.

Taken over by Scanlan Dist., 809 S. Aurora, Stockton, Calif.

Santa Clara County

30. Regal Pale Dist. — Pabst — 1969
381 Sunol St.
San Jose, Calif.

Taken over by Santa Clara Valley Dist., 381 Sunol St., San Jose, Calif.

Santa Clara County

31. Walker Bev. Co. — Lucky Lager — 1969
P. O. Box 295
San Jose, Calif.

Taken over by Bayshore Dist., 843 Reed, Santa Clara, Calif.

Shasta County

32. Cascade Bev. — Schlitz — 1968
P. O. Box B-E
Redding, Calif.

Taken over by Shas-Cade Dist., 1124 Continental, Redding Calif.

Sacramento County

33. Regal Pale Dist. — Pabst
2189 Arcana St.
Sacramento, Calif.

Taken over by Saccani Dist. Co., 2600 5th St., Sacramento, Calif.

Alameda County

34. Howatt Bev. Supp. — Lucky — 1969
1233 21st St. — Miller's
Oakland, Calif.

Taken over by East Bay Bev., 1685 34th St., Oakland, Calif.

Butte County

35. Butte Bev. Service — Pabst
354 East Ave.
Chico, Calif.

Butte Bev. taken over by Rausser Dist., 926 W. 8th St., Chico, Calif.

Contra Costa County

36. Pongrace Dist. Co. — Schlitz
725 Howard St.
Martinez, Calif.

Taken over by Union Bev., 640 W. 10th St., Pittsburg, Calif.

37. Howatt Bev. — Lucky — 1969
1540 Willow Pass — Miller
Concord, Calif.

Taken over by Markstein Bros. Dist., 2025 Market St., Concord, Calif.

SUPREME COURT, U. S.

FILED
JAN 6 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1072

JOSEPH A. RICCHETTI, et al.,
Petitioners,

vs.

MEISTER BRAU, INC., a corporation,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 431 F.2d 1211 and appears as Appendix D to the Petition. The only opinion of the District Court appears in its order, which is reproduced as Appendix A to the petition.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 26, the Court of Appeals under 28 U.S.C. § 1291, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Contrary to the statement in the petition, this case involves only Sections 7 and 16 of the Clayton Act which are quoted in Appen-

dix E of the petition. Although the petitioners' complaint in the District Court also referred to the Sherman Act, in both that court and in the Court of Appeals petitioners abandoned all claims under that Act. (See p. 7 *infra*).

QUESTIONS PRESENTED

None of petitioners' five questions is presented. Petitioners' questions 1, 2 and 4 ignore contrary factual determinations made below, and petitioners' questions 3 and 5 were not urged below.

The only question that can possibly be crystallized out of the record is this:

Where a manufacturer exercises its right to select its customers, and its conduct in that respect is not otherwise unlawful, does it become unlawful under Section 7 of the Clayton Act solely because the manufacturer had theretofore acquired assets from another corporation in an acquisition which itself did not violate Section 7? Are the principles governing one's right to determine to whom to sell altered by the fact that it has acquired assets from another corporation, particularly when that acquisition is not in violation of Section 7, and is a refusal to select petitioners as customers a violation where the reason for the refusal is the petitioners' incompetence and inadequacy as distributors?

STATEMENT OF THE CASE

A. The Proceedings Below

This case started as an application for an interlocutory but mandatory injunction. From the District Court's denial of that injunction, plaintiffs appealed.[1] Because the hearing on that application in the District Court had not been based merely on affidavits but took the form of a full dress trial with 11 witnesses testifying in open court and the receipt of over 44 exhibits, the Court of Ap-

1. On that appeal petitioners unsuccessfully sought injunctions pending appeal from the Court of Appeals and then from Mr. Justice Douglas. (Pet. p. 9.)

peals inquired of counsel whether the matter was not ripe for submission to the trial court for final determination. Agreeing that this was the proper course, the parties returned to the District Court and presented to it a written stipulation submitting the cause for final decision on the record already made (1 R. 82). The trial court then entered its final judgment of dismissal of the case (Pet. App. C). From that judgment petitioners appealed, and the Court of Appeals affirmed.

The petition complains that the trial court made no findings (Pet. 8, fn. 5, 44, fn. 28). But that complaint treats this Court with less candor than propriety requires. The "Stipulation Submitting the Cause for Final Decision" expressly provided that "the Court is requested to and may forthwith determine whether the permanent injunction prayed for by the plaintiffs shall or shall not be granted, *the parties waiving findings of fact and conclusions of law*" (1 R. 83).[2] By handwritten interlineation the stipulation referred to the findings contained in the previous order denying a preliminary injunction. When the stipulation was presented in open court, the District Court specifically noted for the record the provision waiving findings.[3] Thus the parties stipulated that no findings additional to those already contained in the prior order were necessary. It is elementary that all subordinate facts which the evidence will support are deemed incorporated in the findings already made.

B. The Nature of the Case

Before November 17, 1969, the Jos. Schlitz Brewing Company made beer in California and sold it under a brand called "Burgermeister". In 1966, in a suit brought by the United States under

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2. A copy of the stipulation is attached to this brief as Appendix A.

3. Transcript, March 3, 1970, p. 4: "THE COURT: I take it that the findings are waived as indicated in the formal stipulation?
MR. BERTAIN: That's correct.
MR. HAAS: That is correct, your Honor."

Section 7 of the Clayton Act, the trial court below ordered Schlitz to divest itself of the assets used to make that beer, *United States v. Jos. Schlitz Brewing Company*, 253 F.Supp. 129, 183, this Court affirmed the judgment, *United States v. Jos. Schlitz Brewing Co.*, 385 U.S. 37 (1966), and the cause was remanded for supervision of divestiture to an unobjectionable buyer.

Thereafter, in July, 1969, the District Court, in the *Schlitz* case, directed Schlitz to sell "the Burgermeister assets" to respondent Meister Brau, the order stating that the United States had represented to the Court that it had "considered the plan and that * * * [it] believes that the purpose of the Final Judgment and Decree to protect the public interest in free and open competition and against any violation of Section 7 of the Clayton Act will be served by consummation of the proposed plan of sale." (Ex. 20). Among the assets sold was the trade name "Burgermeister". Meister Brau, the sole defendant in the present case, is a small brewer. Its sales constitute but 8/10ths of 1% of the beer sold in the United States (Complaint, ¶ 10, 1 R. 5). It has never brewed or sold "Burgermeister" anywhere, has never brewed any beer in California and holds none of the permits or licenses which would be required for it lawfully to do so (1 R. 34). The only beer it ever sold in California was a dietetic beer called "Lite", the sales of which constituted 5/100ths of 1% of the beer sold in California (Complaint, ¶ 10, 1 R. 5). Meister Brau has never had any business arrangement with any of the petitioners.[4]

In September, 1969 Meister Brau incorporated Burgermeister Brewing Corporation, a wholly owned subsidiary (1 R. 33-34), which is not a party to this action. On November 17, 1969, three days after this action was filed, Burgermeister Brewing Corporation obtained the permits and licenses required of brewers by the State of California and began manufacturing beer under the "Burger-

4. Except that some eight months before the complaint was filed, Meister Brau sold a quantity of "Lite" brand beer to appellant Rossi, for which Rossi has still not paid. 1 R. 34; 4 R. 17, 19.

meister" brand in the San Francisco brewery formerly owned by Schlitz (1 R. 34). Before that date Burgermeister Brewing Corporation had sold no beer to anyone and had no distributors because it had nothing to distribute. It terminated no relationships with petitioners because it never had any relationships with them (1 R. 33-34). As petitioners stated in their opening brief in the Court of Appeals (pp. 47-48):

> "Admittedly there had been no relationship between Meister Brau (or its subsidiary Burgermeister Brewing Corporation) and the appellants."[5]

Before beginning brewing operations on November 17, 1969, Burgemeister Brewing Corporation's management evaluated possible wholesalers as prospective customers, including those theretofore buying "Burgemeister" brand beer from Schlitz. Based on these evaluations, Burgermeister Brewing Corporation decided to select as its customers (distributors) all but eight of the some 145 wholesalers who had bought from Schlitz (4 R. 30). Among the eight not selected were the three petitioners.[6] The nature and bases of these evaluations were covered at length in the evidence. (E. g., 1 R. 36-56; 3 R. 97-106; 4 R. 5-25, 87-100; 5 R. 1-53,

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5. Petitioners have had relations with Schlitz as purchasers from it, but nothing in the order directing Schlitz to sell "the Burgermeister assets" required that the purchaser assume Schlitz's agreements with its distributors. Indeed, insofar as the three petitioners are concerned, there was nothing to assume, for Schlitz sold to them under agreements terminable at the will of either party. (Exhibit 22; 2 R. 98; 4 R. 61; 5 R. 148; Petition, p. 15, fn. 8.)

6. Presumably relying on the complaint's averment of a class action (1 R. 4), the petition assumes that all eight of these distributors are petitioners here. (Pet. pp. 25-26). An action is not a class action until the trial court determines that it is to be so maintained (F. R. Civ. Proc. Rule 23(c)(1)), and eight persons do not constitute a class "so numerous that joinder of all members is impractical." (F. R. Civ. Proc. Rule 23(a)(1)). The trial court did not determine that the action was a class action. On the contrary, when this matter was called to its attention, the court directed counsel to "confine your activity to the named Plaintiffs" (2 R. 35). There are, accordingly, only three petitioners, Ricchetti, Rossi and Bay Beverage.

58-71). As the Court of Appeals concluded, there was ample evidence from which the District Court could properly have found that petitioners' physical facilities, transportation equipment, personnel and past sales records were unsatisfactory (Pet. App. D, xi.)[7]

Petitioners do not contest this evidence or these findings. They argue, instead, that the reasons why they were not selected as distributors by Burgemeister Brewing Corporation are "irrelevant" (Pet. 44, fn. 28), i.e., that the trial court was required to appoint petitioners as "Burgermeister" distributors no matter how incompetent they were.

The purpose of petitioners' suit was to obtain a mandatory injunction to compel Meister Brau to sell "Burgermeister" beer to petitioners for so long as it lacked "good cause" not to do so and for 90 days thereafter, although Meister Brau does not make or sell that beer at all. In denying the interlocutory injunction the District Court found (1 R. 59):

> "(a) That there are no equitable considerations which would prompt this Court to grant injunctive relief herein;
> ***
> "(c) That there is no asserted *status quo* to preserve allegedly existing between plaintiffs and defendant. Plaintiffs' motion for preliminary injunction seeks to impose a *new* status as between the parties."

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7. For example, petitioner Rossi was long overdue on a bill he owed Meister Brau (1 R. 34, 4 R. 17, 19) for "Lite" beer, his physical facilities were sub-standard and "in-house" controls were poor (4 R. 52; 5 R. 68). Petitioner Ricchetti operated at a loss in both 1967 and 1968 (2 R. 85), his sales of "Burgie" were off 25% (1 R. 41; 2 R. 81) and the route he attempted to cover was so large that his driver salesmen, attempting to serve 700 accounts (2 R. 76-77), "don't say hello to their first account until they have driven an hour and a half." (2 R. 79) Petitioner Bay Beverage, after seven years as a beer distributor, was $300 further behind than when it started (4 R. 71) and its "Burgie" sales were off 20%-26% (4 R. 77; 43).

C. Petitioners' Theory

Although the complaint referred to Sections 1 and 2 of the Sherman Act, *all such claims were abandoned in the District Court and in the Court of Appeals.* Nothing was said about the Sherman Act to the trial court in final argument by petitioners' counsel (5 R. 199-213),[8] and petitioners' opening brief in the Court of Appeals stated (p. 4): "Only the alleged violation of Section 7 of the Clayton Act is presented on this appeal."

Section 7 (15 U.S.C. § 18) prohibits certain *acquisitions*, but petitioners have never contended that the acquisition from Jos. Schlitz Brewing Company of the assets used to make "Burgermeister" beer violated Section 7. Their opening brief in the Court of Appeals stated (p. 35):

> "appellants did not contend at the District Court nor do they contend now that the acquisition of the Burgermeister assets as approved by Judge Weigel on July 23, 1969, violated § 7."

They could hardly have done so. By the order of divestiture in *United States v. Jos. Schlitz Brewing Company, supra,* a small brewer entered California to compete with the national brewers already established there. As the vice president of Burgermeister Brewing Corporation saw it, "we felt that under the most ideal conditions, we had a tough task ahead of us. And we felt that we had to field the best team." (5 R. 86) Petitioners were not considered "best team" material and, accordingly, others were selected as distributors for the new "Burgermeister". This selection process is the essence of competition, and to compel the new market entrant to appoint incompetent distributors would emasculate the effectiveness of the divestiture proceedings.

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8. Petitioners' only submission to the trial court was that "we contend that the elimination of these eight distributors, your Honor, will have such an effect at the market place as to arise to a violation of Section 7 of the Clayton Act." 5 R. 199.

DISCUSSION

The foregoing statement is enough to show the absence of anything warranting the grant of the writ. A new manufacturer selects its own customers. It is not claimed that it would have violated any law in doing so, if it had not acquired its assets from another. It is not even claimed that the acquisition violated Section 7 of the Clayton Act. What is claimed is that because it had acquired the assets from another, its selection of its customers somehow came under Section 7. This is a novel theory, and we tried to articulate it in an intelligible question in our statement of the question presented. (p. 2 supra) The rule petitioners espouse is to the effect that every business decision of any corporation is to be tested by Section 7 of the Clayton Act if only that corporation has previously-acquired assets from another corporation, however unassailable and unassailed that acquisition is. If, for example, a corporation having no prior connection with the beer industry were to buy a parcel of land from another corporation also having no connection with the beer industry, all management decisions respecting the disposition of beer brewed in a brewery located on the land would be regulated under Section 7.

Actually, however, not even that question crystallizes out of the facts and findings in this case. Any Section 7 inquiry involves examination into markets. But here the record does not show the area of any relevant market or the share of any market enjoyed by any brewer or wholesaler.[9] There are numerous beers in California and scores of wholesalers distributing them.[10] The case boils down simply to a claim that, in an industry described by a witness of petitioners' as "highly competitive" (5 R. 168), one or

9. Petitioners simply assert that King and Tulare counties, the City of Long Beach, certain other cities in Los Angeles County, and San Francisco are "markets" (Pet. 32, fn. 18) and elsewhere array supposed statistics which are no part of the record. (E.g. Pet. 27)

10. A partial list, furnished by the petition itself, includes Blatz, Budweiser, Carling, Coors, Eastside, Falstaff, Hamm's, Michelob, Millers, Lucky Lager, Olympia, Pabst, Rainier and Schlitz, all well known brands.

two wholesalers out of a group of hundreds may find it difficult to stay in business unless a court directs Meister Brau to sell "Burgermeister" to them.[11]

Yet even that claim is one which the trial court did not credit and was well warranted in not crediting. Thus petitioner Ricchetti still distributes "Schlitz", "Falstaff" and "Pabst" beers, "Rainier" ale and wine as well (2 R. 53). Petitioner Rossi has been in business 28 years (5 R. 187); in 1968 he made $18,445, no part of which came from sales of "Burgermeister" because he had not even begun to sell that beer (obtained by him from the Schlitz Company) until May of 1969 (5 R. 186), and he still has "Hamm's", "Schlitz", "Rainier" ale and numerous other beers to distribute (1 R. 51). Mr. Straley, the owner of petitioner Bay Beverage, has a successful trucking business (4 R. 71, 73), he had no difficulty shifting customers from "Burgie" to "Falstaff" which he also distributes (4 R. 53, 74-76), and he was unwilling to express any clearcut opinion on what effect not having the new "Burgermeister" would have on him (4 R. 59). Petitioners argue the facts as if in a trial court; but the trial court resolved any conflicts, drew the permissible influences, and reached its conclusions about credibility.[12]

Moreover, even had the trial court found a violation, it would not have issued the injunction demanded by the petitioners and would not have been required to do so. Petitioners invoked the trial court's jurisdiction solely under 15 U.S.C. § 26 (Pet. 5-6), and the only remedy sought was a mandatory injunction com-

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11. The petition asserts (p. 28) that the trial court excluded one exhibit supposed to show a trend to concentration. In fact, the trial court permitted the exhibit to be read into the record (5 R. 156-163). The witness who did so then testified that the industry was "highly competitive." (5 R. 168).

12. As petitioners' counsel noted in the trial court: "I feel that on the questions of credibility, and on the various matters the witnesses have testified to, your Honor is the best judge of that. You listened to it and saw the witnesses, and I will not comment upon that testimony." (5 R. 213).

manding respondent to sell them "Burgermeister" beer for an indefinite future time and then to continue to sell "Burgermeister" to whomever petitioners chose as their successors in order to enable them to sell a supposed "Burgermeister distributorship".[13]

15 U.S.C. § 26 (Clayton Act, § 16) authorizes the issuance of injunctions "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings." Under these rules, final injunctive relief does not automatically follow a violation of a federal statute, for issuance is discretionary with the chancellor, *Hecht Company v. Bowles*, 321 U.S. 321, 329 (1944), and particularly so as respects the extraordinary remedy of a *mandatory* injunction. *Moor v. Texas & N.O.R. Co.*, 297 U.S. 101, 105 (1936). Even after being adjudged an unlawful price fixer under the Sherman Act, a manufacturer need not be required to sell to all comers and be thus deprived of the right of customer selection. *United States v. Bausch & Lomb*, 321 U.S. 707, 728 (1944). Apart from all other considerations, the trial court was thus well justified in concluding that the hostility manifested by the petitioners toward respondent would make harmonious business relations impossible.[14]

This case is thus a poor one in which to present the novel legal proposition that one's right of customer selection is less than

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13. The complaint casts the prayer in the negative, as for a decree enjoining respondent "from terminating plaintiffs as Burgermeister distributors except for good cause, with at least 90 days' advance notice and the opportunity for plaintiffs to sell their Burgermeister distributorship to an acceptable purchaser" (1 R. 11). However, there were no "distributorships" to terminate, as none existed. The relief sought was mandatory, to create a relationship and give it tenure.

14. E.g., (2 R. 97) In the papers filed in this Court and in the Court of Appeals in connection with the first appeal, petitioners charged respondent, among other things, with "unconscionable" and "nefarious" conduct, with a "distributors be damned" attitude, with a "callous disregard" of distributors and with "gross incompetence and mismanagement." Application for Stay of Injunction Pending Appeal to the United States Court of Appeal for the Ninth Circuit, Exhibit F, pp. 11, 12, 15, 21, 24.

ordinary if one has theretofore acquired assets by a lawful acquisition. In fact, no decision of this or any other court remotedly suggests any support for that legal theory. Certainly *United States v. E. I. du Pont de Nemours & Company*, 353 U.S. 586 (1957) does not. Petitioners refer to its holding that whenever an acquisition reveals its anticompetitive effects, it may be undone, even though the revelation occurs well after the acquisition. The basis of that rule is that Section 7 deals with incipiencies and probabilities; whenever the acquisition demonstrates that it has worked anticompetitively, it is shown that the incipiency and probability were present at the time the acquisition occurred.

As held below, we have here simply a case where, with neither conspiracy nor monopoly, a manufacturer has chosen its own customers. We submit that the court below correctly stated the law in holding (Pet. App. D, xii):

> "Where, as here, a supplier seeks no more than a better equipped and more aggressive distributor for his product, his conduct may in fact be more beneficial than detrimental to competition, and is not condemned by either the Sherman or Clayton Acts. As the antitrust laws do not prohibit a business from fairly entering into a competitive market, neither do they prohibit its improvement of its competitive stature in the product market."

CONCLUSION

We respectfully submit that the petition should be denied.

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RICHARD HAAS
Attorneys for respondent

Appendix A

STIPULATION SUBMITTING CAUSE FOR FINAL DECISION

Plaintiffs having heretofore moved for a preliminary injunction requiring defendant Meister Brau, Inc. to sell "Burgermeister" brand beer to plaintiffs for resale pending adjudication of the merits of plaintiffs' complaint and the Court having, on November 18, 19, 21, 24 and 25, 1969, held a hearing on plaintiffs' said motion, receiving evidence both oral and documentary, and the Court having, on November 26, 1969 made its order denying plaintiffs' said motion *and entered its findings** and plaintiffs having appealed from said order to the United States Court of Appeals for the Ninth Circuit, and the parties having there indicated a willingness to agree that the order of this Court denying a preliminary injunction be considered a decree denying a permanent injunction, and the Court of Appeals having, on February 25, 1970, given its Advice to Counsel, of which Exhibit A hereto is a copy,

IT IS HEREBY STIPULATED, by and between the parties hereto, that this suit is now submitted to Honorable George B. Harris, Chief Judge of this Court, on the entire record made before the Court on the hearing of plaintiffs' motion for a preliminary injunction, for final decision, and the Court is requested to and may forthwith determine whether the permanent injunction prayed for by plaintiffs shall or shall not be granted, the parties waiving findings of fact and conclusions of law.

IT IS HEREBY FURTHER STIPULATED, by and between the parties hereto, that each of the parties reserves the right to appeal to the United States Court of Appeals for the Ninth Circuit from any final decree which this Court may make, and that in the event

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*The italicized words were inserted in handwriting and initialed by counsel (1 R. 82).

that either party should so appeal, the appeal shall be immediately submitted to said United States Court of Appeals upon the record and the briefs now before the Court in its Matter No. 28,123.

Dated: March 3, 1970.

G. JOSEPH BERTAIN, JR.
TIMOTHY H. FINE
By G. JOSEPH BERTAIN, JR.

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